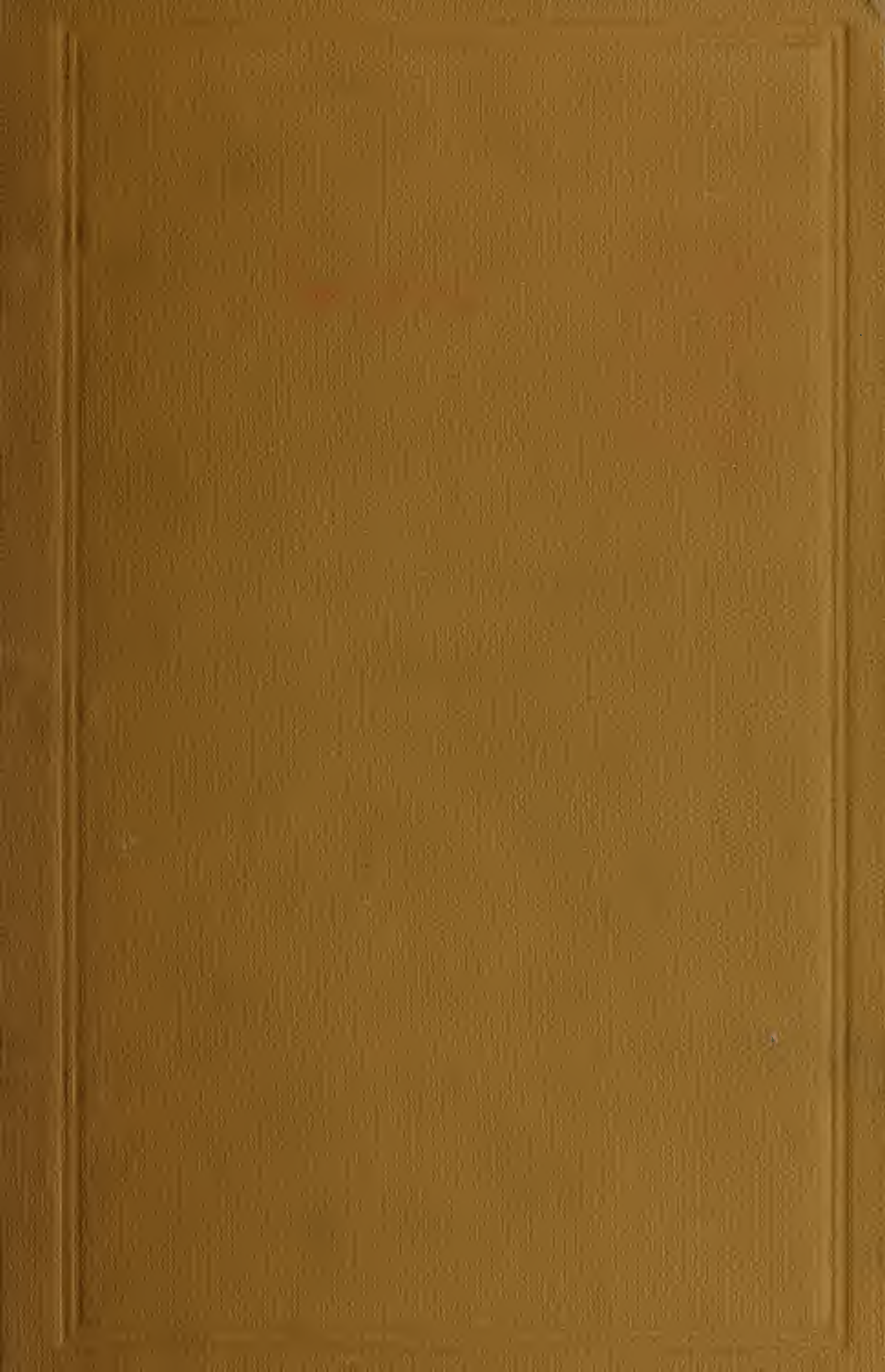

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No. 9506

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol 2225

ILENE WARREN alias SPEED WARREN,
Appellant,

vs.

THE TERRITORY OF HAWAII,
Appellee.

Transcript of Record
In Three Volumes

VOLUME I
Pages 1 to 310

Upon Appeal from the Supreme Court of the Territory of Hawaii

FILED
AUG 9 - 1940
PAUL P. O'BRIEN,
CLERK

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

NO. 9506

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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CHARLES E. CASSIDY, Public Prosecutor of the City and County of Honolulu, and

KENNETH E. YOUNG, Deputy Public Prosecutor, Honolulu Hale, Honolulu, T. H.,

Attorneys for Plaintiff-Appellee.

CHARLES B. DWIGHT, Esq.,

328 Damon Building, Honolulu, T. H.

Attorney for Defendant-Appellant,

Cr. No. Reg.............. Pg...............

In the Circuit Court of the First Judicial Circuit Territory of Hawaii

January Term 1937

TERRITORY OF HAWAII,

vs.

ILENE WARREN alias "SPEED" WARREN,

Defendant.

INDICTMENT FOR MURDER IN THE SECOND DEGREE [1*]

First Count:

The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that Ilene Warren alias "Speed" Warren, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 3rd

*Page numbering appearing at foot of page of original certified Transcript of Record.

day of August, 1937, with force and arms, unlawfully, feloniously, wilfully and of her malice aforethought, and without authority and without justification and without extenuation by law, did kill and murder one Wah Choon Lee, a human being then and there being, and did then and there and thereby commit the crime of murder in the second degree, contrary to the form of the statute in such case made and provided.

Second Count:

And the Grand Jury of the First Judicial Circuit of the Territory of Hawaii, in order to charge the said Ilene Warren alias "Speed" Warren with the crime of murder in the second degree, arising from the same criminal acts and transactions [2] as hereinabove set forth in the first count hereof, in different form and count, do further say and present that Ilene Warren alias "Speed" Warren, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 3rd day of August, 1937, with force and arms, unlawfully, feloniously, wilfully and of her malice aforethought and without authority and without justification and without extenuation by law did then and there, and while the hands and body of one Wah Choon Lee were in contact with a certain metal plate then and there being, cause the said metal plate to be charged with a deadly charge of electric current, and the said Ilene Warren alias "Speed" Warren did then and there and thereby

electrocute and give to him, the said Wah Choon Lee, certain mortal injuries, from which said electrocution and mortal injuries the said Wah Choon Lee did thereafter and on, to-wit, the said 3rd day of August, 1937, die; and that so in manner and form aforesaid, and at the time and place aforesaid, the said Ilene Warren alias "Speed" Warren unlawfully, feloneously, wilfully and of her malice aforethought, and without authority and without justification and without extenuation by law, did kill and murder the said Wah Choon Lee, and did then and there and thereby commit the crime of murder in the second degree, contrary to the form of the statute in such case made and provided.

Third Count:

And in order to set forth the unlawful and felonious acts of the said Ilene Warren alias "Speed" Warren, mentioned in the first and second counts hereof, in different form and [3] count, to meet the proof, the Grand Jury aforesaid do further say and present that Ilene Warren alias "Speed" Warren, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 3rd day of August, 1937, with force and arms, unlawfully, feloniously, wilfully and of her malice aforethought and without authority and without justification and without extenuation by law did cause a certain metal plate to be charged with a deadly charge of electric current, she, the said Ilene Warren alias

"Speed" Warren well knowing at the time when she so caused the said metal plate to be charged with electricity as aforesaid that the said Wah Choon Lee was about to bring and would bring the hands and body of him, the said Wah Choon Lee, into contact with the said metal plate; and that thereafter, and wihle the said metal plate was charged with electricity as aforesaid, the said Wah Choon Lee did bring his body and hands into contact with the said metal plate and by reason thereof the said Wah Choon Lee was electrocuted and did receive certain mortal injuries, from which electrocution and mortal injuries the said Wah Choon Lee did thereafter and on, to-wit, the said 3rd day of August, 1937, die; and that so in manner and form aforesaid, and at the time and place aforesaid, the said Ilene Warren alias "Speed" Warren unlawfully, feloniously, wilfully and of her malice aforethought, and without authority and without justification and without extenuation by law, did kill and murder the said Wah Choon Lee, and did then and there and thereby commit the crime of murder in the second degree, [4] contrary to the form of the statute in such case made and provided.

A true bill found this 5th day of August, 1937.

(s) HANS H. HARDERS
Foreman of the Grand Jury

Assistant

(s) CHAS. E. CASSIDY
Public Prosecutor of the City
and County of Honolulu

[5]

Indictment presented and filed at 5 o'clock P. M. Aug. 5, 1937.

(s) CLAUS ROBERTS
Clerk

Arraignment..........................
Plea..

Copy of the within Indictment before arraignment furnished.

In the Circuit Court of the First Circuit
Territory of Hawaii

January Term A. D., 1938

Criminal No. 14332

Honorable Louis Le Baron, First Judge Presiding

THE TERRITORY OF HAWAII,

vs.

ILENE WARREN alias "SPEED" WARREN,
Defendant.

VERDICT

We the jury, in the above entitled cause, find the defendant guilty of manslaughter, leniency recommended.

(s) PATRICK JOHN O'SULLIVAN
Foreman

February 18, 1938.

[Endorsed]: Filed February 18, 1838. O. Sezenevsky, Clerk. [6]

In the Supreme Court of the Territory of Hawaii

No. 2376

Error Criminal No. 14332 from Circuit Court, First Judicial Circuit, Honorable Louis Le Baron, Presiding.

THE TERRITORY OF HAWAII,

Plaintiff and Defendant-in-Error,

vs.

ILENE WARREN alias "SPEED" WARREN,

Defendant and Plaintiff-in-Error.

PETITION FOR APPEAL

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

Ilene Warren alias "Speed" Warren, Defendant herein, deems herself aggrieved by the Judgment of the Supreme Court of the Territory of Hawaii made and entered on October 20th, 1939, pursuant to the Opinion and Decision of said Court made and entered on the 20th day of October 1939, and the Decision on Petition for Re-hearing of said Court rendered and filed on November 25th, 1939, and hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from said Judgment for the reasons specified in the Assignment of Errors hereto attached, and she prays that this appeal may be

allowed and that a transcript of the record and proceedings upon which said Judgment and Decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that said Judgment and Decree may be reversed. [70]

Dated at Honolulu, Hawaii, this 20 day of February, A. D. 1940.

ILENE WARREN alias
"SPEED" WARREN,
Defendant-Appellant,
By CHARLES B. DWIGHT,
Her Attorney. [71]

Receipt of a copy of the within acknowledged this 20 day of February, 1940.

KENNETH E. YOUNG,
Attorney for Territory of Hawaii.

[Endorsed]: Filed Feb. 21, 1940. Gus K. Sproat, Deputy Clerk, Supreme Court. [69]

[Title of Supreme Court and Cause.]

NOTICE OF APPEAL

Now comes Ilene Warren, alias "Speed" Warren, Defendant Appellant above named, and gives Notice of Appeal from the Judgment of the Supreme Court of the Territory of Hawaii made and entered on the 20th day of October, 1939, affirming the Judgment and Sentence of the Circuit Court of the First

Judicial Circuit, Territory of Hawaii, to the Ninth Circuit Court of Appeals.

Dated at Honolulu, Hawaii, February 20, 1940.

ILENE WARREN alias
"SPEED" WARREN,
Defendant-Appellant,
By CHARLES B. DWIGHT,
Her Attorney. [73]

ORDER ALLOWING APPEAL

Upon filing by the Defendant-Appellant, Ilene Warren, alias "Speed" Warren, of a bond in the sum of $250 with good and sufficient sureties, the appeal in the above entitled cause is hereby allowed.

JAMES L. COKE,
Chief Justice. [74]

Receipt of a copy of the within acknowledged this 20th day of Feb., 1940.

KENNETH E. YOUNG,
Attorney for Territory of Hawaii.

[Endorsed]: Filed Feb. 21, 1940. Gus K. Sproat, Deputy Clerk, Supreme Court. [72]

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes Ilene Warren, alias "Speed" Warren, Defendant above named, by Charles B. Dwight, her attorney, and files the following Assignment of Errors, upon which she will rely in the prosecution

of her appeal in the above entitled cause from the Judgment entered herein on the 20th day of October, 1939, dismissing the Writ of Error of Defendant from the Verdict, Judgment and Sentence of the Circuit Court, First Judicial Circuit, of the Territory of Hawaii, and sustaining the Verdict, Judgment and Sentence of said Circuit Court, and from the Decision upon Petition for Rehearing, which petition was duly filed within the term and within the time required by the rule of the Court, which Decision was entered herein on the 25th day of November, 1939.

I.

That the Supreme Court of the Territory of Hawaii [76] erred in dismissing the Writ of Error of the Defendant from the Verdict, Judgment and Sentence made and entered on the..............................day of..., 1938, of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and in sustaining the Verdict, Judgment and Sentence of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, which Judgment of the Supreme Court was made and entered on the 20th day of October, 1939, pursuant to a Decision made and entered on the 20th day of October, 1939.

II.

That the Supreme Court of the Territory of Hawaii erred in dismissing the Defendant's Petition for a Rehearing in the Supreme Court, which Decision was rendered and filed on November 25th, 1939.

III.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of Edward J. Burns, a witness for the Territory of Hawaii, concerning his observations in the home of the Defendant on the night of August 3, 1937, was competent and admissible and in sustaining the ruling of the Circuit Court overruling the objection of the Defendant and in denying the motion to strike, upon the ground that the entry into the home of Defendant was illegal and violative of the Fourth and Fifth Amendments to the Constitution and that the admission of said evidence violated Defendant's rights under the Fourth and Fifth Amendments to the Constitution.

In the Circuit Court, the witness, Edward J. Burns, upon being duly sworn, testified that he was a police officer [77] having joined the Department on November 16, 1936, and worked as a foot patrolman; that on August 3, 1937, he was assigned to special duty with Captain Caminos; thereupon the Defendant objected as follows:

> "Mr. Dwight: May it please the Court, at this time I want to object to the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial; * * * upon the further ground that any evidence of this witness by observation in the house was illegal and in violation of the Fourth and Fifth Amendments of the Constitution.

The Court: The Court will overrule the objection.

Mr. Dwight: Save an exception.

The Court: The exception may be saved and noted."

(Tr. of Ev. p. 201.)

The witness then testified that he was assigned by Captain Mookini to go with Captain Caminos to raid the house of the Defendant; that he left Honolulu at 5:30 P. M., arrived at Wahiawa and left the Wahiawa Police Station at 8:45 P.M., in company with Captain Kalauli, Captain Caminos and four other officers. Thereupon the Defendant again objected as follows:

> "Mr. Dwight: May I have an additional ground of objection, for the record, and that is that any evidence of this witness was secured without the consent of the defendant and in violation of her rights under the Constitution.
>
> The Court: Objection overruled.
>
> Mr. Dwight: Exception."
>
> (Tr. of Ev. p. 202.)

The witness then testified that the group of seven officers left the station; that he separated from the group and [78] went to Defendant's place; that he wore a grey suit and black shoes and that all of the other officers were also in civilian clothes; that on reaching Defendant's home he knocked on the wall next to the door; no one answered so he re-

turned to the street; that he walked back and again knocked; that he saw someone look out of a window and heard footsteps; the door was opened by a woman, Billie Penland; that he followed her into the parlor and stopped by a wicker table and she asked a question, then he followed her into a room, where there was a bed, dresser and washstand, and as she stood by, the witness took off his tie, started to remove his coat and then had a conversation as a result of which he gave the woman three dollars; that the woman took the three dollars and left the room and took with her a basin of water, when she returned he was undressing, she left and returned again, when he had completed undressing, she went to the bed and removed her robe and sat on the bed; that he reached for his clothes, took out a handkerchief, police badge and whistle, blew the whistle three times, showed her the badge and told her she was under arrest for investigation; that he blew his whistle because that was a prearranged signal between Captain Caminos and his men and the witness that they were then to raid the house.

At the conclusion of the case in chief for the Territory of Hawaii the Defendant moved to strike the testimony as follows:

> "Mr. Dwight: At this time I move to strike the testimony of Officer Burns or so much thereof as occurred subsequent to the time that he testified the defendant asked what he meant by breaking into this house, to-wit, everything

that he testified to subsequent to that point [79] when defendant entered the room downstairs upon the ground that the testimony is incompetent, irrelevant and immaterial; upon the ground that it was procured in violation of the defendant's rights under the Constitution, the Fourth and Fifth Amendments, and upon the further ground that at the time he was a trespasser upon the premises of the defendant in violation of the defendant's rights under the Constitution of the United States.

The Court: Motion denied.

Mr. Dwight: May I save an exception?

The Court: Exception noted."

(Tr. of Ev. pp. 501-502.)

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in overruling the objections of the Defendant and in denying Defendant's motion to strike for the following reasons:

(1) That the evidence was obtained as a result of an illegal entry and search of Defendant's home, without Defendant's consent, and in violation of the Defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States, and therefore, was incompetent and inadmissible.

(2) That the evidence was highly prejudicial to the Defendant and the overruling of Defendant's objections and denial of Defendant's motion to strike was prejudicial error.

IV.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of Lou Rodgers, a witness for the Territory concerning the electrical equipment in the home of the Defendant, was competent, relevant, material [80] and admissible; and in sustaining the denial by the First Circuit Court of Defendant's motion to strike upon the ground that the testimony was obtained as a result of an illegal search and that the admission thereof incriminated Defendant and violated Defendant's rights under the Constitution and the Fourth and Fifth Amendments thereof.

At the trial in the Circuit Court, the witness upon being duly sworn testified that the Defendant procured the material and that John Kiehm installed the electrical apparatus in the home of the Defendant; that the wires ran from the front and back doors to the transformer; the witness also located the switch and drew a picture of the transformer.

On cross-examination the witness further testified that she was questioned at the police station by Captain Hays, who exhibited to her the electrical equipment seized in Defendant's home and that every question he asked was based upon the electrical equipment and that her entire statement to the police was based upon the equipment that was in her presence and in answer to questions regarding it.

On redirect examination the witness testified that when the police had her at the station shortly after the death of Wah Choon Lee, they had some electrical equipment there and that it was the same equipment that was in the home of the Defendant when she lived there; and stated that that was how the police got the lead and that the police then questioned her as to what she knew personally about the equipment, how she knew it was in the house, how it was put in and all such things; and that all she told the police was based upon her memory and her own observations and not what she saw at the police station. (Tr. of Ev. p. 112). Thereupon the Defendant moved to strike [81] the testimony.

The motion to strike, the ruling of the Court thereon and the exception to the ruling are as follows:

> "Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it now affirmatively appears that the evidence the government is now offering by virtue of placing this witness on the stand was obtained as the result of an illegal search and that this evidence tends to incriminate this defendant and violates her rights under the Fourth and Fifth Amendments to the Constitution." (Tr. of Ev. p. 119)
>
> "The Court: The Court is ready to rule. This evidence which Mr. Dwight asked to be

stricken and excluded upon the ground that it is an invasion of the defendant's Constitutional rights under the Fourth and Fifth Amendments, in that he *argues is* based upon the evidence seized and the illegal search and seizure, is denied * * *

Mr. Dwight: May I suggest an exception?

The Court: You may."

(Tr. of Ev. p. 121)

At the conclusion of the case in chief of the Territory of Hawaii the Defendant again moved to strike the testimony of this witness, as follows:

"Mr. Dwight: I move to strike the testimony of Lou Rodgers * * * upon the ground that any evidence that she may have given in this particular case was based entirely upon the electrical equipment * * * that was ordered suppressed by this Court and the further ground that her entire testimony was adduced at this trial from knowledge gained by the law officers * * * when they made an illegal and invalid search in contravention of [82] defendant's rights under the Constitution.

The Court: Motion denied.

Mr. Dwight: May I save an exception?

The Court: Exception noted."

(Tr. of Ev. pp. 502-503)

That the Supreme Court of the Territory of Hawaii erred in sustaining the ruling of the Circuit Court denying the Defendant's motion to strike for the following reasons:

(1) That the evidence was obtained from an illegal source, to-wit, an illegal search and seizure, and the admission thereof was in violation of the Defendant's rights under the Constitution and the Fourth and Fifth Amendments thereof and therefore incompetent, irrelevant and immaterial.

(2) That the evidence was highly prejudicial to the Defendant and the denial of Defendant's motion to strike was prejudicial error.

V.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of John Kiehm, a witness for the Territory of Hawaii, concerning the electric equipment in the home of the Defendant was competent, relevant, material and admissible and in sustaining the Circuit Court's rulings overruling the objection of the Defendant and denying the Defendant's motion to strike the testimony, upon the ground that the same was based upon information procured during an invalid search and therefore tended to incriminate the Defendant under the Fifth Amendment and which evidence was obtained in violation of the Defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States. [83]

At the trial in the Circuit Court the witness upon being sworn testified that he was a resident of Wahiawa and an automobile mechanic; that the Defendant came to his garage and asked if he could

install some device on the door so that when a person opened it such person would receive an electric shock; that he told her he could and later purchased a transformer and installed it; that there was one wire leading to the front door and one to the back, the main wire led to a switch on the door panel; that he did not recall if he installed the switch but did connect the wires thereto; that the main wire was connected to the fuse plug and the fuse plug was connected to the ordinary wire; that the transformer was located above the living room door, one wire running to the front door, one to the back and one to the ground located outside the house; that he had a conversation with the Defendant after the apparatus was put in concerning the wiring and how to operate it; that he was an auto electrician and studied electricity.

The witness then proceeded to draw the floor plan of the home of the Defendant locating thereon the front door, the stairway, the electric switch, the transformer, the fuse plug, the manner in which the wires were connected to the front and back doors, the wires to the ground and also drew a large diagram showing the entire circuit marking thereon the fuse plug, transformer, switch and connections to the switch; and then described the switch as a knife type switch, double throw, with two wires leading to the transformer and then again drew a diagram representing the approximate size of the transformer, at which time the Defendant objected as follows: [84]

Mr. Dwight: May it please the Court, may I renew my objection? The further objection, that this witness is to reproduce evidence by an actual drawing of what this Court has suppressed. I object as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled. There is no showing but what this was entirely independent of any illegal search and seizure.

Mr. Dwight: Exception.

The Court: Exception noted."

(Tr. of Ev. p. 146)

Thereupon the witness testified as to the dimensions of the transformer; that it was about four and one-half inches wide by six inches long and about three inches thick; that the line running from the transformer to the ground outside was marked on the plan, which wire was connected to a pipe; that the wire leading to the front door was soldered onto the front screen and approached the screen from the right upper corner inside the house about an inch above the hinge.

On cross-examination the witness testified that he made a statement to the police after the police officer was killed and that he signed a statement at the police station; that it was the first statement that he made concerning the case; that at the time the statement was made the police exhibited to him certain electrical equipment which consisted

of a transformer, some wires and a switch and that they were the same articles that he put into the house of the Defendant. (Tr. of Ev. p. 151)

The witness further testified that in 1936 the Defendant drove up to the shop and asked him if he could install [85] some kind of a device on the front door to keep away soldiers because they came at all hours of the night and pounded on the door; that he told the defendant he could and further told the Defendant that a transformer would give a shock; that the Defendant asked him if he would guarantee that it would not kill and that he told the Defendant that the shock was not strong enough to harm a person and that the Defendant then asked him to install the apparatus. (Tr. of Ev. p. 152).

On redirect examination, the witness testified that all of his evidence theretofore given was from his memory of what happened and what he had put in the house and on recross examination he testified that the police showed him the equipment and asked him what he knew about that equipment and then the witness began to tell his story. Whereupon the Defendant moved to strike the testimony as follows:

> "Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial; that it is based upon information procured during an invalid search and that this testimony tends to incriminate the defendant under the Fifth Amendment and was obtained

in violation of the defendant's rights under the Fourth Amendment and also the further ground that the testimony was procured in violation of law."

(Tr. of Ev. p. 155)

In a formal decision the Court denied the motion. (Tr. of Ev. pp. 163-166)

"Mr. Dwight: May I save an exception to the Court's rule?

The Court: Exception saved and noted. [86]

Mr. Dwight: On the grounds stated and I renew my objections all the way through including this witness your Honor on the same ground."

(Tr. of Ev. p. 166)

That the Supreme Court of the Territory of Hawaii erred in sustaining the rulings of the Circuit Court overruling the objection of the Defendant and denying the defendant's motion to strike for the following reasons:

(1) That the evidence was obtained from an illegal source, to-wit, an illegal search and seizure and the admission thereof was in violation of the Defendant's rights under the Constitution and the Fourth and Fifth Amendments thereof and therefore incompetent, irrelevant and immaterial.

(2) That the overruling of the objection of the Defendant and denial of the Defendant's motion to strike was prejudicial error.

VI.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of Billie Florence Penland, a witness for the Territory of Hawaii, to the effect that the Defendant told her that she pulled the switch, was competent and admissible and in sustaining the ruling of the Circuit Court in denying Defendant's motion to strike the testimony of the witness, which motion was based upon the ground that the evidence was produced and obtained in violation of Defendant's rights under the Fourth and Fifth Amendments to the Constitution.

In the Circuit Court the witness, Billie Florence Penland, upon being duly sworn, testified that she was ac- [87] quainted with the Defendant and lived with her on August 3, 1937, on which day there was a raid; that officer Burns was there; that they went to the reception room; that the officer blew a whistle and some one banged on the door; that the defendant came to the door; that she saw the defendant again on the front porch when there was a struggle with the officer; that she ran upstairs and later saw the defendant upstairs when the defendant told her to go into the closet and stay there, and that the defendant told her she turned the switch.

On cross-examination the witness testified that while she was held at the police station, the police showed her some wire, equipment, and a transformer and then they began to pump her, and that she did not make any statement to the police until

the wires, transformer and door was shown to her and then they compelled her to tell what she knew about the door.

On redirect examination the witness stated that all she testified to was based upon her memory of what happened on the night of August 3rd, 1937.

Upon completion of the testimony the Defendant moved to strike as follows:

> "Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial. The evidence was produced and obtained in violation of defendant's rights under the Fourth and Fifth Amendments of the Constitution. * * *"
>
> (Tr. of Ev. p. 316)

The trial Court denied the motion and the exception was duly noted, as follows:

> "The Court: The motion is denied." [88]
>
> (Tr. of Ev. p. 316)
>
> "Mr. Dwight: Save an exception.
>
> The Court: Exception granted."
>
> (Tr. of Ev. p. 317)

That the Supreme Court of the Territory of Hawaii erred in sustaining the ruling of the Circuit Court, denying the Defendant's motion to strike for the following reasons:

(1) That the evidence was obtained and adduced as a result of an illegal search and seizure, and

in violation of the Defendant's rights under the Constitution of the United States and the Fourth and Fifth Amendments thereto, and was therefore incompetent and inadmissible.

(2) That the evidence was highly prejudicial to the Defendant and the denial of the Defendant's motion to strike was prejudicial error.

VII.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in instructing the jury over the objection and exception of Defendant, as requested by the Territory of Hawaii, in Territory of Hawaii's requested instruction No. 12, as follows:

> "The Court: You are instructed that Section 5404 of the Revised Laws of Hawaii 1935 provides as follows:
>
> > 'Policemen, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense.'
>
> You are hereby instructed that the term 'reasonable suspicion' as used in said statute is construed by the [89] Court to mean probable cause.

You should consider this law together with all the evidence in the case in determining whether or not the deceased, Wah Choon Lee, was lawfully upon the premises of the defendant at the time in question.''

To the giving of the instruction above set out, the Defendant objected, and stated her reasons therefor orally in the Judge's Chambers in the presence of the Assistant Public Prosecutor, to-wit, that Section 5404 of the Revised Laws of Hawaii 1935, incorporated in said instruction is unconstitutional and void in that under said section and instruction arrests without warrant may be made in either felony or misdemeanor upon probable cause irrespective of whether the crime was committed in the presence of the arresting officer or not; that under said section an arrest without warrant for an offense not committed in the presence of the arresting officer could be made in the case of a misdemeanor; that if any crime had been committed at the time of the entry of the officers in the home of Defendant it was a misdemeanor, and that therefore the said instruction contravened the Fourth Amendment to the Constitution of the United States; that said instruction permitted the jury to determine from all the evidence in the case, instead of only such facts as were cognizable by the officers at the time of entry, in determining whether a crime had been committed in their presence, and that the instruction was prejudicial to the rights of the defendant. At the conclusion of the charge of

the Circuit Court, in the presence of the jury, before the jury retired, the Defendant duly excepted.

That the Supreme Court of the Territory of Hawaii [90] erred in sustaining the Circuit Court's action in giving to the jury the above instruction over the objections of the Defendant for the following reasons:

(1) That said instruction is not the law; that Section 5404 of the Revised Laws of Hawaii 1935, is null and void, in that it contravenes Article Four of the Amendments to the Constitution of the United States, in that under said section, arrests without warrant in misdemeanors may be made upon probable cause, whereas under the Constitution arrests may only be made in the case of misdemeanors where the offense is committed in the presence of the arresting officer.

(2) That said instruction was highly prejudicial to Defendant in that it permitted the jury to determine the legality of the arrest from all of the evidence and not from such facts as were cognizable only by the arresting officer.

(3) That said instruction was erroneous and the giving of which constituted reversible error.

VIII.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in instructing the jury over the objection and exception of Defendant, as requested by the Territory

of Hawaii, in Territory of Hawaii's requested instruction No. 12A, as follows:

> "You are instructed that if you believe from all the evidence and beyond a reasonable doubt that the deceased was acting as a police officer and that he went upon the premises of the defendant for the purpose of assisting another police officer, and that the deceased in so doing acted under such circumstances as would justify a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to commit an offense against the laws of the Terri- [91] tory of Hawaii, then you must find under such circumstances that the deceased, Wah Choon Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased as a trespasser."

To the giving of the instruction above set out, the Defendant objected, and stated her reasons therefor orally in the Judge's Chambers in the presence of the Assistant Public Prosecutor, to-wit: That said instruction was erroneous in law; that it contravened the Fourth Amendment to the Constitution of the United States in that under said instruction an arrest without warrant in the case of a misdemeanor could be made upon probable cause even though the offense was not committed in the presence of the arresting officer and that said instruc-

tion was prejudicial to the Defendant, and at the conclusion of the charge of the Court, in the presence of the jury, before the jury retired, the Defendant duly excepted.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in giving to the jury the above instruction over the objection of the Defendant, for the following reasons:

(1) That said instruction is not the law, that the instruction permits arrests to be made in misdemeanors, without warrant and without the presence of the arresting officer and therefore conflicts with Article IV of the Amendments to the Constitution of the United States.

(2) That said instruction was highly prejudicial to defendant in that it permitted the jury to determine the right to make an arrest upon all the evidence in the case and not only upon such facts as may have been known to the arresting officer.

[92]

IX

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in instructing the jury over the objection and exception of Defendant, as requested by the Territory of Hawaii, in Territory of Hawaii's requested instruction No. 14, as follows:

"You are instructed that if you believe from all the evidence and beyond a reasonable doubt

that the deceased was acting as a police officer and that he went upon the premises of the defendant for the purpose of arresting and detaining for examination such persons as he might have found thereon, and that the deceased in so doing acted under such circumstances as would justify a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to commit an offense against the laws of the Territory of Hawaii, then you must find under such circumstances that the deceased, Wah *Coon* Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased as a trespasser.

And in this connection you are further instructed that the fact as to whether or not there was a 'no trespassing' sign upon the premises at the time, would not alter the right of the deceased, Wah Choon Lee, or the other police officers with him, to be upon the premises in question."

To the giving of the instruction above set out, the defendant objected, and stated her reasons therefor orally in the Judge's Chambers, in the presence of the Assistant Public Prosecutor, to-wit: that said instruction was erroneous in law; that it contravened the Fourth Amendment to the Consti-

tution of the United States, in that under said Instruction an arrest without warrant in the case of a misdemeanor could be made upon probable cause, even though the offense was not [93] committed in the presence of the arresting officer and that said instruction was prejudicial to the Defendant; and at the conclusion of the charge of the Court, in the presence of the jury, before the jury retired, the Defendant duly excepted.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in giving to the jury the above instruction, for the following reasons:

(1) That said instruction is not the law, that the instruction permits arrests to be made in misdemeanors without warrant and without the presence of the arresting officer and therefore conflicts with the Fourth Amendment to the Constitution of the United States.

(2) That said instruction was highly prejudicial to Defendant in that it permitted the jury to determine the right to make an arrest upon all the evidence in the case and not upon such facts as may have been known to the arresting officer.

X.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's refusal to give to the jury defendant's requested instruction No. 16, upon the subject of arrests, as follows:

> "You are instructed that a police officer may arrest without a warrant one guilty of a misdemeanor only if the misdemeanor is committed in the officer's presence."

The Territory of Hawaii objected to the giving of said instruction upon the ground that it conflicted with Section 5404 of the Revised Laws of Hawaii 1935, set forth in [94] Territory's requested instruction No. 12.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's refusal to give said instruction for the following reasons:

(1) That said instruction properly states the law of arrests and is consistent with the Constitution of the United States, and that Section 5404 of the Revised Laws of Hawaii is unconstitutional and void.

(2) That the refusal to give said instruction was highly prejudicial to Defendant in that the jury was not properly instructed upon the vital subject of arrests.

XI.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's refusal to give to the jury Defendant's requested instruction No. 18, upon the subject of arrests, as follows:

> "You are instructed that to justify an arrest for a misdemeanor without warrant it must have been committed in the officer's presence, and it is so committed, where he can by the

exercise of his own senses detect it; but mere suspicion is not enough."

The Territory of Hawaii objected to the giving of said instruction upon the ground that it conflicted with Section 5404 of the Revised Laws of Hawaiii 1935, set forth in Territory's requested instruction No. 12.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's refusal to give said instruction for the following reasons:

(1) That said instruction properly states the law of arrests and is consistent with the Constitution of the [95] United States and that Section 5404 of the Revised Laws of Hawaii, 1935, is unconstitutional and void.

(2) That the refusal to give said instruction was highly prejudicial to Defendant in that the jury was not properly instructed upon the vital subject of arrests.

That as to Assignment of Errors Nos. VII to XI inclusive, the Defendant at the conclusion of the charge of the Court, in the presence of the jury, before the jury retired, excepted to the Circuit Court's ruling as follows:

"Mr. Dwight: May it please the Court at this time may I except to the granting by the Court of all of the prosecutions requested instructions upon my general objection?

The Court: You may.

Mr. Dwight: To the granting of Prosecution's Requested Instructions Nos. 3, 4, 5, 12, 12A, 13, 14 and 17 over objection, and the refusal of the Court to give Defendant's Requested Instructions numbered 1, 2, 3, 4, 8, 10, 13, 16, 18, 28, 30, 31, 32 and 37.

The Court: Exception will be noted. The objections are already in the record."

(Tr. of Ev. pp. 564-565.)

XII.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in accepting the verdict of guilty of manslaughter, leniency recommended, for the reason that the said verdict is contrary to the law, evidence and weight of the evidence, to which ruling the Defendant duly excepted, in the presence of the jury and before [96] it was dismissed as follows:

"Mr. Dwight: At this time, may it please the Court, may I except upon the ground it is contrary to law, the evidence, the weight of the evidence, and hereby give notice of a motion for a new trial."

(Tr. of Ev. p. 593.)

XIII.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Judgment and Sentence of the Circuit Court upon the verdict for the reason that the same is contrary to law, upon the

imposition of which sentence the Defendant excepted as follows:

> "Mr. Dwight: May the defendant save an exception to the sentence upon the ground it is contrary to law * * *"
>
> (Tr. of Ev. p. 597.)

The aforesaid Assignments of Error Nos. I to XIII inclusive above set forth are filed and based upon all the pleadings and exhibits in the above entitled cause, upon all the clerk's minutes, the verdict, judgment, sentence, upon the official reporter's transcript of the testimony, upon all of the proceedings, records and files, which are hereby all referred to and incorporated herein, and made a part of these Assignments of Errors, as if fully set out herein, for the purpose of this appeal.

Wherefore, the Defendant, Appellant herein, Ilene Warren, alias "Speed" Warren, prays that judgment in said cause be reversed and the cause remanded, with instructions to the trial Court to discharge the Defendant and/or with [97] instructions concerning further proceedings therein, and for such other and further relief as may be just in the premises.

Dated at Honolulu, Hawaii, this 20 day of February, A. D 1940.

ILENE WARREN alias
"SPEED" WARREN,
Defendant-Appellant,
By CHARLES B. DWIGHT,
Her Attorney. [98]

Receipt of a copy of the within acknowledged this 20th day of February, 1940.

KENNETH E. YOUNG,
Attorney for Territory of Hawaii.

[Endorsed]: Filed Feb. 21, 1940. Gus K. Sproat, Deputy Clerk, Supreme Court. [75]

[Title of Supreme Court and Cause.]

CITATION ON APPEAL

The United States of America—ss.

The President of the United States of America to:

The Territory of Hawaii and to Charles E. Cassidy, Public Prosecutor of the City and County of Honolulu, its Attorney:

You are hereby cited and admonished to be and appear at the Ninth Circuit, to be held at the City and County of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an order allowing appeal, filed in the office of the Clerk of the Supreme Court of the Territory of Hawaii, wherein Ilene Warren alias "Speed" Warren, is the Defendant and you are the Plaintiff, to show cause, if any there be, why the judgment in such appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf. [100]

Witness, the Honorable Charles E. Hughes, Chief Justice of the Supreme Court of the United States

of America, this 21st day of February, A. D. 1940, and of the Independence of the United States 164th.

[Seal] JAMES L. COKE,
Chief Justice.

Attest:

GUS K. SPROAT,
Deputy Clerk of the Supreme Court of the Territory of Hawaii.

Received a copy of the within citation February 21, 1940.

TERRITORY OF HAWAII,
By KENNETH E. YOUNG.

Let the within Citation issue.

JAMES L. COKE,
Chief Justice. [101]

Receipt of a copy of the within acknowledged this 21 day of Feb., 1940.

KENNETH E. YOUNG,
Attorney for Territory of Hawaii.

[Endorsed]: Filed Feb. 21, 1940. Gus K. Sproat, Deputy Clerk, Supreme Court. [99]

[Title of Supreme Court and Cause.]

CLERK'S CERTIFICATE

I, Gus K. Sproat, Deputy Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the petition for appeal filed in the above entitled cause, being pages 69 to 71, both inclusive, and in pursu-

ance of the praecipe for transcript of record, being pages 107 to 109, both inclusive, do hereby transmit to the United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record on appeal composed of pages 1 to 113, both inclusive, and the transcript of proceedings had and testimony given, Volume 1, Parts 1 and 11, Numbered 868, and filed January 14, 1938.

I do hereby certify that pages 1 to 68, both inclusive, and pages 102 to 106, being indictment for murder in the second degree, verdict, clerk's minutes of the Circuit Court, First Judicial Circuit, opinion of the Supreme Court, judgment of the Supreme Court, petition for rehearing, decision on petition for rehearing, application for recall of mandate, order of the Supreme Court, recalling mandate, cost bond, and the transcript of proceedings had and testimony given Volume 1, Parts 1 and 11, No. 868, filed January 14, 1938, are full, true and correct copies of the originals on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii. [114]

I do certify further that pages 69 to 101, both inclusive, and pages 107 to 113, both inclusive, being petition for appeal, notice of appeal, and order allowing appeal, assignment of errors, citation on appeal, praecipe for transcript of record, and orders enlarging time to file record on appeal, are the originals filed in the Supreme Court of the Territory of Hawaii.

I do certify also that the cost of the foregoing transcript of record on appeal is $25.00, and the said amount has been paid by Charles B. Dwight, Esq., attorney for the appellant.

In witness whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 18th day of April, A. D. 1940.

[Seal]

GUS K. SPROAT,
Deputy Clerk of the Supreme Court of the Territory of Hawaii. [115]

Circuit Court, First Judicial Circuit
First Division

Territory of Hawaii

January Term, A. D. 1938

Indictment
C-14332

Murder, Second Degree

THE TERRITORY OF HAWAII,
Plaintiff,

vs.

ILENE WARREN alias "SPEED" WARREN,
Defendant.

Honolulu, T. H., Wednesday, Feb. 2, 1938.

Before Hon. Louis Le Baron, First Judge, and a jury.

Mr. H. A. Wilder, Clerk
Mrs. Olga Sezenevsky, Clerk
Mr. George R. Clark, Reporter

Appearances:

Hon. Charles E. Cassidy, Public Prosecutor, by Kenneth E. Young, Esq., Assistant Public Prosecutor, for the Territory.

Mr. Charles B. Dwight, for the defendant.

(TESTIMONY)

TRIAL BY JURY

(At the hour of nine o'clock a. m., all parties to this cause being present, the defendant being pres-

ent and represented by counsel, and all the jurors on the panel upon roll call by the clerk being present, the impanelling of a jury was commenced, proceeded with and at the hour of 11:15 o'clock a. m. the present panel was exhausted [1*] upon the Territory exercising its seventh peremptory challenge. Thereupon the Court excused the remaining jurors in the jury-box until nine o'clock a. m., February 3, 1938.)

Mr. Young: If your Honor please, before this panel is drawn, the Territory asks the Court to order certain witnesses to be back tomorrow morning without further subpoena.

Mr. Dwight: Call the witnesses inside.

Mr. Young: (Upon two women and one man entering the court-room door) Lou Rodgers, John Kiehm and Lucy McGuire.

The Court: (To aforesaid persons) You three witnesses, who have been subpoenaed in this case, Territory vs. Ilene Warren, are notified the case is continued until tomorrow morning at nine o'clock. Be back here without fail. (To the Clerk) Proceed to draw a special panel of twenty-six names.

(Thereupon the clerk drew twenty-six names, as ordered). Those names will be placed upon a special venire returnable tomorrow morning at 8:45 a. m.

(At 11:30 o'clock a. m. a recess was taken until Thursday, February 3, 1938, at nine o'clock a. m.)

[2]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

Honolulu, T. H., Thursday,
February 3, 1938.

FURTHER TRIAL BY JURY

(At the hour of nine o'clock a. m. the trial by jury was resumed.)

The Clerk (Mr. Wilder). Criminal 14332 Territory of Hawaii vs. Ilene Warren alias "Speed" Warren, for further trial.

Mr. Dwight: At this time may I be permitted to make a motion in chambers instead of asking to have the jury excused?

The Court: All right, Court will take a short recess to hear the motion in chambers.

(A brief recess was taken.)

In Chambers.

Mr. Dwight: At this time, in view of the recent developments, I move that the Court order the immediate return of all property ordered suppressed. The police have been using that equipment, taking the transformer to several radio stations to locate one of a similar nature. The attempt by the government to use evidence that had been suppressed for the purpose of gathering other evidence and proving indirectly what they cannot prove directly would compel the defendant to be a witness against herself. I would like the Court to make an order for the immediate return to the defendant of all the property ordered suppressed.

The Court: Isn't that motion superfluous?

Mr. Dwight: You have made an order. [3]

Mr. Young: I don't know anything about that. The order is in effect. I haven't used it myself since the order.

Mr. Dwight: I have been reliably informed by the operator of a radio station that this happened.

Mr. Young: I don't know anything about that. All I know is that the evidence is in the Police Department. I don't care what they do with it. It is none of my concern.

Mr. Dwight: I think an order for the immediate return is in order.

The Court: My impression is the order calls for the immediate return.

Mr. Young: I know it is not coming from the Prosecutor's Office but it is coming from the Police Department. I can assure you that nothing connected with that house is being used. As an officer of this Court I feel it my duty to keep as much out as the order calls for.

The Court: The Court will make an additional order granting that motion to clarify the order already entered to suppress, that the evidence seized by this illegal search be returned forthwith to the defendant.

Mr. Dwight: May I suggest by stipulation, "Or such person as the defendant may designate in writing", so that we may have someone go and get it?

The Court: To the defendant or such person as the defendant may designate in writing and to re-

turn [4] it forthwith immediately. Do you wish to have a little time to have that delivered?

Mr. Dwight: I think I can write the letter and have her sign it. (Thereupon Mr. Dwight types the letter and has the defendant sign the same)

(At 9:15 o'clock a. m. the Court reconvened and the Clerk (Mr. Wilder) called the roll of jurors in the jury-box and found eleven present. He also read the return of the deputy sheriff to the special venire issued out of this court on February 2nd and called the roll of those served, who were found to be all present with the exception of three excused and those unserved. Thereupon these jurors were duly sworn by the clerk and examined by the Court as to their qualifications and disqualifications to sit as trial jurors for the January 1938 term of Court and found to be qualified. The remaining trial jurors on the new panel were sworn as to their qualifications to sit in the instant case and the impanelling of a jury to try the case was resumed, proceeded with and completed.)

Mr. Dwight: The jury is satisfactory.

Mr. Young: The jury is satisfactory to the Territory.

The Court: Let the record so show. Swear the jury.

(At 10:05 o'clock a. m. the jury was duly impanelled, accepted and sworn.)

Mr. Young: May we have a short recess at this time, your Honor? [5]

The Court: The rest of the jury panel will be excused for this case. Until further order of the Court, you are excused. The Court stands in recess.

(At 10:05 o'clock a. m. a brief recess was taken and at 10:20 o'clock a. m. the Court reconvened.)

Mr. Dwight: May it please the Court, at this time may I ask the prosecution to elect upon what count of the indictment they intend to proceed?

Mr. Young: Our Supreme Court has held, your Honor, in a case like this it is not necessary.

Mr. Dwight: Our Supreme Court does not so state. The statute says:

(Reading Sec. 5502, RLH 1935) "In an indictment for an offense which is constituted of one or more of several acts or which may be committed by one or more of several means or with one or more of several intents or which may produce one or more of several results, two or more of those acts, means, intents or results may be charged in the alternative."

The Court: What section is that?

Mr. Dwight: That is all that our statute says. This indictment sets forth murder in the second degree and various and divers means. Both of the grounds conflict and the defenses conflict.

Mr. Young: I think the case in 11 Hawaii 341 will settle that.

Mr. Dwight: The statute was only passed last year for that very purpose.

The Court: What is here in Sec. 5502?

Mr. Dwight: Section 5502 deals solely with the indictment. Prior to that time you could demur to [6] the indictment because it is duplicitous. This section simply allows and the defense is entitled to know upon which count they intend to proceed. If the Court will examine the counts, the Court will see a difference between the three counts, where the defenses will be entirely different.

The Court: I see. You resist this motion?

Mr. Young: That case in 11 Hawaii covers it. The case in 11 Hawaii is squarely in point.

The Court: Are you familiar with 11 Hawaii?

Mr. Dwight: In 1915 the statute was passed to cover that defect in an indictment. There is no question we are entitled to an election. We must, before we put on our defense, compel the prosecution to elect. I am asking them to elect now.

Mr. Young: I submit it to the Court.

The Court: The Court will reserve its decision on that.

Mr. Dwight: Very well.

Mr. Young: Any further motions?

Mr. Dwight: If your Honor please, I move that all witnesses in this case be excluded from the hearing of this court-room.

The Court: No objection to that motion, the motion will be granted. All witnesses and prospective witnesses will be excluded from this court-room

and from the hearing of this court-room until further order of the Court. Until further order of the Court all witnesses will remain outside the court-room and that rule will be observed throughout [7] the trial of this case. You may proceed, Mr. Young.

PLAINTIFF'S OPENING STATEMENT TO THE JURY

Mr. Young: If the Court please, and gentlemen of the Jury, I know it is the first experience of some of you on a criminal trial jury. I believe before a juror can perform his duty he should know something about the procedure. This is what is called an opening statement by the prosecution and in it we give you a statement of what we expect to prove in the case. Anything we may say is not to be used as evidence against this defendant or for the Territory. It is merely a bird's-eye view of how the prosecution sees this case so that you may follow the evidence as it comes in step by step. Of course, we cannot put on all the evidence at the same time. It is for that reason, so that you may know about what to expect in the line of testimony. After the opening statement the Territory will then put on its evidence. Counsel for the defense may make his opening statement after I make mine or he may reserve it.

Mr. Dwight: Counsel is supposed to make his opening statement. He has a right to set forth

only the case of the prosecution. I except to counsel giving the jury a lecture.

The Court: Objection will be overruled.

Mr. Dwight: Exception.

(Mr. Young continued his opening statement to the jury on behalf of the plaintiff, in the course [8] of which he said:)

After the evidence is put on for the Territory, then the defense may make their opening statement, as they see fit. At that time the defense will put that on.

Mr. Dwight: I object to this. I except to counsel's remark.

Mr. Young: I suggest the jury should know this.

The Court: Proceed.

Mr. Dwight: May I save an exception?

(Mr. Young continued his opening statement to the jury on behalf of the plaintiff, in the course of which he said:)

After the evidence is all in, gentlemen of the jury, you will hear the argument of the prosecution. We have the first argument because we have the burden of proof. After that the defendant will argue. After you have heard all the evidence and all the argument in the case, you will then be instructed as to the law in this case, so you must wait until you have heard everything before you know what the law is in the case.

Mr. Dwight: I submit counsel's opening statement is entirely out of place.

The Court: That is just preliminary and instructive for the jurors.

Mr. Dwight: May I save an exception?

(Mr. Young continued his opening statement to the jury on behalf of the plaintiff, in the course [9] of which he said:)

I am going to read you, gentlemen of the jury, the indictment returned by the grand jury in this case, reading from the original indictment.

(The indictment was read in its entirety)

To this indictment, gentlemen of the jury, defendant has entered her plea of not guilty. Her plea put in issue each and every material allegation of that indictment. Out of fairness to this defendant I tell you that that indictment is not evidence against her and should not be considered as evidence against her. It is merely a formal charge against this defendant. The Territory, gentlemen, will prove to you beyond a reasonable doubt each and every material allegation as set forth in that indictment. I am going to make a statement at this time of the facts briefly as we are going to offer them to you in evidence. I am not going to make a lengthy statement of the facts that we expect to prove because I feel that the witnesses in this case can give you a better story of what happened than I can. As I stated before, that is the only reason I am giving you a statement. We are going to prove, gentlemen of the jury, that on August 3, 1937, the defendant, Ilene "Speed" Warren, was operating a

house of prostitution at Wahiawa in the City and County of Honolulu. On that date seven police officers met at the Wahiawa court house. One of those officers was dressed in civilian clothes. He went to the house of Ilene "Speed" [10] Warren, as any man would in civilian clothes, knocked at the door, asked for a woman and they allowed him entrance into the place. After he was in there he found one of the occupants—girls in there, one by the name of Billie Penland just about to commit an act of prostitution. By a pre-arranged signal he blew a whistle. Two officers were stationed on the back of the house, not on the lot of "Speed" Warren but on an empty lot, and the other four officers were stationed out on the front street, not on the property of "Speed". About nine o'clock they heard the shrill blast of a police whistle. They came onto the premises, four police officers,—Caminos, another officer by the name of Kam Yuen. The four of them approached the house, the front door of the house, made known to the occupants therein that they were police officers. The door refused to open as though a fight or something was going on inside. They attempted to knock down the door, then Caminos discovered the door did not open in but that it opened out. There was nothing on the door, no handle, no knob. They attempted to pull the door by reaching up and grabbing a metal sheet. Wah Choon Lee, the deceased, grabbed that piece of metal.

Mr. Dwight: At this time, may it please the Court, I except to counsel's remarks as offering to prove something which this Court has suppressed, offering to prove evidence that has been suppressed by this Court. [11]

Mr. Young: Counsel has not stated anything that has been suppressed by the Court.

Mr. Dwight: He made a statement about a plate.

The Court: The objection will be overruled.

Mr. Dwight: May I save an exception?

(Mr. Young continued his opening statement to the jury on behalf of the plaintiff, in the course of which he said:)

That it was raining at the time; that he made a perfect ground so far as that metal (iron) and the grasping of the door is concerned; that he received at that time a deadly charge of electricity and he was killed almost instantaneously and never regained consciousness. He was taken fifteen minutes later to the Army hospital at Schofield, where he was pronounced dead, never regaining consciousness. We will prove by experts that the conditions under which this happened made this door a dangerous thing to human life.

Mr. Dwight: Can my objection and exception go to counsel's remarks and exceptions to the Court's ruling?

The Court: Exception may be noted.

Mr. Dwight: On the further ground it is made simply to prejudice the jury against the defendant.

The Court: Let the record so show.

(Mr. Young continued and completed his opening statement on behalf of the plaintiff to the [12] jury, as follows:)

We will further prove that while this was taking place on the outside the defendant was the owner and occupant of these premises; that she was operating a house of prostitution; that at that time there were two prostitutes in that house plying their unlawful trade; that the defendant did throw the switch that gave this deadly charge; that she did it maliciously. In order to prove the identity of the defendant, in order to prove the background of this affair, we are going to show you by evidence that about two years previous to this time her place was raided; the defendant's place was raided by the police; she was placed under arrest; that she objected to this manner of treatment and she thought that she would stop it if it ever happened again and hired a man to put in that deadly epuipment for the purpose of keeping drunk soldiers away, who frequented her place, and for the second reason for keeping police officers away. We will prove that by other prostitutes. We will prove that this all happened here in the City and County of Honolulu. Gentlemen, when we have finished our proof, the Territory is going to ask you for a verdict of guilty of murder in the second degree.

Mr. Dwight: May I reserve my opening statement?

The Court: Mr. Dwight may reserve his opening statement until the termination of the prosecution's case. Proceed now with the evidence of the prosecution.

[13]

WITNESSES FOR THE PLAINTIFF

WILLIAM ERNEST BELL,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. William Ernest Bell.

Q. What is your occupation?

A. Draftsman for the Planning Commission of the City and County.

Mr. Young: Just face towards the jury, Mr. Bell, so they can hear everything you say and speak up a little louder.

Q. How long have you been a draftsman for the City and County of Honolulu?

A. For the last four years.

Q. What are your educational qualifications to act as a draftsman?

A. It runs in the same line as engineering. I am supposed to know drafting. I took a post graduate from Stanford and am a high school graduate.

Q. Approximately how long have you been acting in your capacity?

(Testimony of William Ernest Bell.)

Mr. Dwight: Oh, I will admit the witness' qualifications.

Q. Now, Mr. Bell, did you have occasion at my request to go out to Wahiawa and take measurements of certain streets out there and locate certain houses that you found on those streets?

A. Yes, sir. [14]

Q. Did you do that? A. Yes, sir.

Q. When was that? A. Monday.

Q. Did you make a plan at my request?

A. Yes.

Q. Did you draw that to scale?

A. Yes, sir.

Q. What was the scale that you drew that to?

A. One to twenty.

Q. Will you just tell us what streets you surveyed?

A. It was off California, Olive Street, Avacoda, two Hawaiian names,—I can't remember exactly how you pronounce them—Neal Street and the railroad.

Q. You later prepared a draft of that?

A. Yes.

Q. I am going to show you a plan here (produces a paper). Just take one end. Will you tell the Court whether or not this is the plan that you drew?

A. (Examining the same) Yes, that is the plan.

Mr. Dwight: This was drawn about——

(Testimony of William Ernest Bell.)

A. One inch to twenty feet.

By Mr. Young:

Q. This is a true and correct plan of what you saw and measured out there? A. Yes.

Q. Can you locate some of these?

A. This is the court house (indicating); California off Kamehameha (indicating); First National Bank, Japanese School (indicating). Those other houses I took them off the tax maps, not exactly the outside outline [15] but just to show more or less where the houses are situated. It indicates the houses are on certain lots.

Q. And each lot you have a building on, there is a building? A. Yes.

Q. This is the railroad down there (indicating)?

A. Yes.

Q. Your legend there indicates just exactly what it means here?

A. A round circle means electric light poles just about in that direction.

Q. "X" means "railroad crossing"?

A. "X" means "railroad crossing."

Q. Spots of green? A. Hedging.

Q. You found those on the premises?

A. Yes, I found those on the premises. I drew those to scale.

Cross Examination

By Mr. Dwight:

Q. You say that the houses are not properly located?

(Testimony of William Ernest Bell.)

A. They are properly located. As far as the outline of the house are, there may be a little change.

Q. I see some names here (indicating on map).

A. I took them from the tax office. I have the right house in the right location.

Q. There is a dwelling (indicating on map). I draw your attention to this lot that seems to have more pegs on it than any other, the one with the hedge and the sisal plant, I notice. Did you check to see who owned [16] that property?

Mr. Young: The owner is Marvin Connell. That is the present registration at the tax office; they are the responsible owners.

A. Transferred from the first name above.

Q. That transfer was about four years ago?

A. I couldn't say; I don't know how often the transfers were made.

Q. Do you know that the tax office indicates the name Marvin Connell was the owner of the property with the date? A. Yes.

Mr. Dwight: I am going to object. It is incompetent, irrelevant and immaterial. I don't see what bearing this map will have on the issues. My general objection is it is incompetent, irrelevant and immaterial. There is no connection here whatever with the defendant. Somebody else owns the property.

The Court: The Court will admit this map in evidence as Exhibit A for the Prosecution, subject

(Testimony of William Ernest Bell.)

to a motion to strike, if it is not connected up with this defendant in a material, relevant and competent way.

Mr. Young: Q. Mr. Bell, I understand you got this name from the tax office? A. Yes.

The Court: Subject to the motion to strike later, it is introduced as Exhibit A for the Prosecution.

(The paper referred to was received in evidence and marked "Prosecution's Exhibit A.")

[17]

Mr. Young: No further questions.

Mr. Dwight: No questions.

PERRY W. PARKER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name?

A. Perry W. Parker.

Q. What is your occupation, Mr. Parker?

A. Detective with the Honolulu Police Department.

Q. How long have you been a detective for the Honolulu Police Department?

A. About six months.

(Testimony of Perry W. Parker.)

Q. How long have you been with the Honolulu Police Department? A. About five years.

Q. About five years. What were your duties before you were a detective?

A. I was in the Patrol Division, Radio Patrol.

Q. Do you know a person by the name of Ilene Warren alias "Speed" Warren?

A. Yes, I do.

Q. Is she in court here this morning?

A. Yes.

Q. Will you indicate where she is?

A. She is sitting to the right of Mr. Dwight there (indicating).

Mr. Young: May the record show the identification?

The Court: The record may show that the [18] witness indicates the defendant.

Q. Do you know her by any other names?

Mr. Dwight: Immaterial; objected to on that ground.

Mr. Young: It is for the purpose of identification.

Mr. Dwight: She has been identified by this witness.

Mr. Young: It is very relevant. She might be going by this name on the map.

Mr. Dwight: The witness has definitely testified and he gave her name.

The Court: Objection will be sustained.

(Testimony of Perry W. Parker.)

By Mr. Young:

Q. Mr. Parker, what relations, if any, have you ever had with this woman?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial; having no bearing upon the issues, this witness' testimony. The statute of limitations will prevent any reference to that; it is too remote. Still the additional ground is they are attempting to impeach this witness and she has not yet taken the stand and she does not have to take the stand.

The Court: What is the purpose of this question?

Mr. Young: I can lead more directly to the point. Counsel objected it is leading.

Mr. Dwight: I am objecting because I know what is coming. Counsel knows what is coming [19]

Mr. Young: I will withdraw the question.

Q. Now, Mr. Parker, in your official capacity do you know where Ilene "Speed" Warren lives?

A. Yes.

Q. Where does she live?

A. On Muliwai Street at Wahiawa.

Q. On Muliwai Street at Wahiawa?

A. Yes.

Q. How many times, approximately, have you been to that place?

A. Oh, I would say I have been there at least ten times.

(Testimony of Perry W. Parker.)

Q. You have been there at least ten times. When was the first time you were there? About when, just approximately?

A. I believe the first time was on a Federal liquor raid about three years ago.

Mr. Dwight: I am going to move that testimony be stricken as incompetent, irrelevant and immaterial, as tending to prejudice this jury and upon the further ground that prosecution is attempting to impeach this witness the character of defendant before she takes the stand. If she doesn't take the stand, it is immaterial.

Mr. Young: I believe I made it clear in my opening statement it is a circumstance in this case, showing the malice, the motive, the identity and everything behind this case. We have got to have the background.

Mr. Dwight: May it please the Court, I [20] take it, that they cannot adduce it on that theory. I have stated my legal objection. To begin with, may it please the Court, this witness, this defendant, does not have to take the stand and her character is not in issue until she takes the stand and no evidence can be adduced to impeach her testimony until after she takes the stand. This is incompetent, irrelevant and immaterial in connection with this particular charge. To begin with, it is too remote.

The Court: Objection will be overruled.

Mr. Dwight: Before the Court rules, I would like to take a recess to show the Court authorities.

Mr. Young: In order to obviate any further objections along this line, I suggest your Honor dismiss the jury and I will make a full and complete offer of proof so that your Honor will know what the prosecution proposes to prove.

Mr. Dwight: Even assuming that the defendant does take the stand, this testimony is inadmissible unless she puts her character in issue.

The Court: It is eleven o'clock. The Court will take a recess. Any authorities either counsel wants to advance they can do so in chambers. Court will take a recess.

Mr. Dwight: From now until tomorrow?

The Court: Until two o'clock.

(A recess was taken until two o'clock p. m.) [21]

Afternoon Session

In Chambers

(At two o'clock p. m., court convened in chambers and both counsel present, the following proceedings were had):

The Court: The record is now open for the purpose of the offer of proof as proposed by Mr. Young in open court. This is now in the absence of the jury.

Mr. Young: The last question that was put to the witness was as to the time that he was at "Speed" Warren's, the first he had been there. We propose to offer to prove by this witness that on or about the first day of June——

The Court: What year?

Mr. Young: (Continuing) 1936, this police officer went upon the premises of "Speed" Warren, took her and one Lou Rodgers into custody and took them to the police station. That is all that we propose to prove by this witness. The reason we are offering that proof is to establish a date, a definite and known time when "Speed" Warren developed an animosity towards the Police Department. We will then connect that up with the other evidence brought in the case. Let the record show it is not offered in any way for casting any aspersions upon the character of the defendant. If the incidental effect is that, we can't help it, the identity of the defendant in this case being important because it is a circumstantial evidence case.

Mr. Dwight: I will state my objections. [22]

The Court: Just one minute, before you do that. Mr. Young, you have no objection to the Court striking out any words the witness might have used in giving his testimony of "arrest", "raid" or "prostitution", or anything of that sort?

Mr. Young: If the witness don't know that of his own knowledge, I have no objection to the Court striking that.

Mr. Dwight: Now, just a moment,—that is just exactly what I was trying to avoid and that is exactly what the Supreme Court said was highly improper practice in the Corum decision.

The Court: This is not before the Court.

Mr. Dwight: My objection to this testimony is that it is incompetent, irrelevant and immaterial.

The Court: Before you go into it, do you object to having the Court strike the words "raid", or "arrest" or "prostitution"? You don't object to that?

Mr. Dwight: I think the Court should strike them out and the jury be admonished, but I should say that type of procedure is highly prejudicial to the defendant and should not be countenanced by this Court, and the Supreme Court has definitely laid down that rule in the Corum case, that is, going to the order of proof.

The Court: The Court will and does now on its own motion strike the words of the witness of [23] "raid", "arrest" or any word suggesting the offence of prostitution.

Mr. Young: As a matter of fact, I will withdraw the whole question.

Mr. Dwight: We may as well get it clear. Now, have you that Corum decision? Have you the advance decision? I want the Court to get the similarity. I take it from counsel's remarks that he was attempting to get into evidence a statement

made by the defendant to this witness for the purpose of proving motive.

Mr. Young: I made no such statement.

Mr. Dwight: The offer that counsel makes now affirmatively shows that it is incompetent, irrelevant and immaterial. It affirmatively shows that the purpose of that testimony is simply to put the defendant's character in issue and that it is improper evidence to show improper character.

The Court: There was nothing from the questions testified to that suggested the purpose of raising the issue of character or bad character.

Mr. Dwight: Arresting them and taking them to the Police Station; you can't bring in evidence of the defendant being arrested. You can say that the defendant was convicted.

The Court: The Court has corrected that. The form of the question was not objectionable in any way. The answer responds to that question. The words of "arrest" and "raid" the Court has stricken in protection of the rights of the defendant and [24] the Court will make it clear to the jury that the question of the bad character or the character of the defendant is not in issue, nor is it the purpose of this evidence to put it in issue.

(The Court took a short recess.)

In Court.

(At 2:35 o'clock p. m., the Court reconvened, the defendant and respective counsel being present, and the jurors all present, the following further proceedings were had and testimony was given):

Mr. Dwight: May it please the Court, I want to apologize to the Court for being late. Shortly before two o'clock I asked the bailiff in Judge Brooks' Court to notify this Court that I would be there for a few minutes. I am sorry that the Court did not get the word.

The Court: Thank you. Your apology is accepted. You gentlemen stipulate the jury is present?

Mr. Young: So stipulated; also the defendant.

Mr. Dwight: Yes.

The Court: Let the record so show. Now, the Court has on its own motion stricken from the record the words which this witness (Perry W. Parker) has used of "raid", "arrest" or any suggestion of any offense at this time. The purpose of this testimony is merely to fix the time and place and the jury is instructed not to take any evidence —this evidence which has been stricken in any way as putting in issue the character of the defendant. It is not for that purpose at all and should not be considered by you. [25]

Mr. Young: May we proceed, your Honor?

(Testimony of Perry W. Parker.)

The Court: Proceed.

Mr. Young: Thank you.

Direct Examination

(Continued)

By Mr. Young:

Q. Mr. Parker, you testified roughly as to the first time that you were at "Speed" Warren's place. Do you recall the date of the last time you were there, approximately?

A. That was around June 1, 1936.

Q. Around June 1, 1936. About what time of day did you go there?

A. It was on a Monday night between eight and nine p. m.

Q. And what did you do, if anything, at that time in relation to the defendant?

A. The defendant was at her home. I went in and arrested the defendant and three other girls.

Q. Do you know the names of the girls?

Mr. Dwight: Now, may I have my same objection to this testimony as incompetent, irrelevant and immaterial; furthermore, as tending to adduce in evidence certain evidence that was procured in violation of the Constitution of the United States, the evidence in this so-called visit having been suppressed by the Honorable Judge Peters, the District Magistrate of Wahiawa. I object to this evidence being stated in the presence of the jury.

The Court: I wonder if you, Mr. Parker, in making your answers will leave out the words

(Testimony of Perry W. Parker.)
"arrest" or "raid" or anything that implies a crime or offense at that time. The purpose of [26] your testimony is not to establish any evidence of any crime at that time, nor should you put before the jury there was such a possibility of such a crime. The Court will strike that word "arrest" out.

The Witness: What was the question?

The Court: The word "arrest" will be stricken out and the jury asked to disregard it. The purpose of this testimony is not to put in issue the character of the defendant at all but merely to establish the time and place.

Mr. Dwight: May I have my exception to the ruling? I think it goes further than the Court's ruling.

The Court: All right. You may have your exception.

Mr. Young: Mr. Parker, the Court doesn't want you to say anything about any legal relations.

Q. I want to know, did you go any place with her, did you do anything with "Speed" Warren at that time?

A. I can't answer that unless I use that word again.

Q. Did you walk her some place?

A. I drove her in my car down the police station.

Q. Drove from her house? A. Yes.

(Testimony of Perry W. Parker.)

Q. Anybody else with you?

A. They were all together; there were three other girls and two police officers.

Q. There were three other girls and two police officers with you? [27]

A. No, we didn't go all in one car; we split up.

Q. Do you know the names of those girls?

A. Yes, I do.

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial. It proves nothing of the issues raised by this indictment.

The Court: The Court appreciates it is preliminary evidence and overrules the objection.

Mr. Dwight: Save an exception.

A. Lou Rodgers, Betty Ward and Mollie Norton.

Q. And you took them to the police station?

A. That is correct.

Q. Will you step down here? (Indicating Prosecution's Exhibit A tacked on blackboard.)

A. (The witness does as directed.)

Q. Are you acquainted with that general vicinity at Wahiawa (referring to Prosecution's Exhibit A)? A. Yes.

Q. Do you know which street she lives on?

A. Muliwai.

Q. This is Muliwai Avenue; the arrow points north this way (indicating); Olive Avenue this way (indicating); Kuahiwi Avenue this way (indicating on Exhibit A); there is a land mark here (indicating); Bishop First National Bank there

(Testimony of Perry W. Parker.)

(indicating); this is railroad track over here (indicating). You understand this diagram sufficiently to point out where this house was that you found "Speed" Warren in that day that you testified to?

A. Yes.

Q. Will you point it out on the map, please?

[28]

A. Yes, right here (indicating on Exhibit A).

Q. That was the house?

A. We came out this way (indicating), block and about a half on the righthand side.

Q. Righthand side as you go towards the mountain? A. Yes, that is right.

Mr. Young: May the record show it is the lot marked "Marvin Connell"?

The Court: The location designated as "Marvin Connell."

Q. Was that the place you took "Speed" Warren from in your automobile?

A. Yes, that is the place.

Q. Those girls came out of that house?

A. Yes.

Q. Betty, Lou and Mollie came out of that house? A. Yes.

Mr. Young: No further questions.

Mr. Dwight: I make a motion to strike all of the evidence of this witness as incompetent, irrelevant and immaterial——

The Court: Motion denied.

Mr. Dwight (continuing): Having no bearing on the issues raised by the indictment.

(Testimony of Perry W. Parker.)

The Court: Motion denied.

Mr. Dwight: Save an exception.

The Court: The defendant and these three girls were the three of them?

The Witness: Three of them.

The Court: Did you later see them some [29] other place in Honolulu? When they left that house in your automobile, who was in your automobile besides yourself?

The Witness: A. I don't know but we all ended up in the vice squad in Honolulu.

By Mr. Young:

Q. Would you recognize any of those girls if you saw them again?

A. Yes, I can recognize all of them.

Mr. Young: May I call one for identification, Lou Rodgers?

(The bailiff calls a woman as directed and a woman enters the court-room.)

Q. Could you tell me whether or not this is one of the girls? (Referring to the woman who entered the court-room.) A. Yes.

Q. What is her name? A. Lou Rodgers.

Mr. Young (to Lou Rodgers): Q. What is your name? A. Lou Rodgers.

Mr. Young: May the record show that Lou Rodgers was one of the girls in the car at that time?

The Court: Let the record so show.

ALBERT FRAGA,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Albert Fraga. [30]

Q. You are a police officer for the City and County of Honolulu? A. Yes, sir.

Q. How long have you been a police officer, Mr. Fraga? A. About seven years.

Q. What are your duties, just briefly, as a police officer?

A. I am attached to the Identification Bureau, which takes in the registration of police records and the taking of photographs.

Q. And you take photographs, then, in connection with your official duties? A. Yes, sir.

Q. Will you state whether or not you ever knew a person by the name of Wah Choon Lee?

A. I did.

Q. Did you know him personally?

A. Yes.

Q. Is that person alive or dead, to your knowledge? A. No, sir, he is dead.

Q. In connection with your official duties, did you ever photograph the body of Wah Choon Lee?

A. I did.

Mr. Dwight: I will admit Wah Choon Lee is dead.

(Testimony of Albert Fraga.)

The Court: Let the record so show.

Q. Where did you photograph him?

A. City and County morgue.

Q. When? A. August 4. [31]

Q. What time? A. About ten a. m.

Q. Did you develop those negatives that you took? A. I did.

Q. Will you recognize the pictures that you developed? A. Yes.

Q. Will you look at these two pictures and see if they are the pictures you took? Handing pictures to witness.)

Mr. Dwight: Let me see them. (Examining same.)

Q. Will you look at these pictures, please, and state what they are, if you know? (Handing pictures to witness.)

The Court: Q. Do you know?

A. Yes.

Q. What is this?

A. This represents the body of officer Wah Choon Lee, as I saw him at the morgue on the morning of the fourth of August, 1937, at ten a. m., after his clothing was taken off.

Q. You took this photograph and you developed it yourself? A. Yes.

Mr. Young: May this be received in evidence?

(Testimony of Albert Fraga.)

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, as prejudicial to the defendant. There is no necessity for the accumulation of evidence. If it is for the purpose of proving death, the defendant has already admitted that Wah Choon Lee is dead. It is cumulative; it is not the best evidence; it is secondary; it proves no fact in issue because that particular fact has been admitted. [32]

The Court: Is that your only purpose?

Mr. Young: My purpose is to establish the fact of death, establish the identity of deceased and for the further reason we offer to prove by one of these pictures a very material part of the evidence indicating a certain wound upon the deceased.

Mr. Dwight: That is the reason I objected. It is not the best evidence. They have definite testimony; they can have direct testimony as to the nature of any marks on the body of the deceased. This is secondary. I object on the ground it is not the best evidence.

Mr. Young: Photographs are always admissible. They are true and correct of what they saw.

Mr. Dwight: They took the picture and are using it for an entirely different purpose to prove something that can be proved by direct evidence. They had a doctor perform the autopsy. He is the only person who can testify. They are bringing in something that is not the best evidence.

(Testimony of Albert Fraga.)

The Court: The Court will overrule the objection.

Mr. Dwight: Save an exception.

The Court: Exception may be noted. It will be received as Exhibit B.

(The picture referred to was received in evidence and marked "Prosecution's Exhibit B.") [33]

By Mr. Young:

Q. Now, this other picture that you have in your hand, will you please tell the Court and jury what that is without showing the jury?

A. This represents the upper portion of officer Wah Choon Lee, showing a portion of his right hand.

Q. Is this the way you saw it at the time you took it? A. Yes, sir.

Q. When did you take that picture?

A. On the morning of the 4th of August, 1937.

Q. This is a true and correct copy of that negative, that photograph that you took at the time and place? A. (Examining the same) Yes.

Q. This is Wah Choon Lee, the man you knew?

A. Yes, sir.

Mr. Young: May this be received in evidence as Territory's Exhibit "C", I believe, it is?

By the Court:

Q. Both of these pictures were taken at the same time? A. Yes.

Q. August 4? A. August 4.

(Testimony of Albert Fraga.)

Q. What time? A. At about ten a. m.

Mr. Dwight: What was the last exhibit, the first photograph?

The Court: B.

Mr. Dwight: May it please the Court, I object to the introduction in evidence of this picture [34] upon the ground already stated, to-wit, that for the purpose of proving death the fact has already been admitted; second, that it is cumulative and the photograph already in evidence shows the body of the deceased, which was introduced in evidence over objection, and I further object, may it please the Court, upon the ground that it is not the best evidence. I understand that this particular photograph is being offered for a certain definite purpose, which can be proved by direct testimony.

The Court: What is the purpose of offering Exhibit C in addition to Exhibit B?

Mr. Young: "C", the particular purpose is showing the nature of the wound. The authorities are all agreed that a picture of the deceased may be put in evidence where the nature of the wound is material to the prosecution's case. Counsel cannot stipulate our case. We have a right to prove it the way we want to. I can furnish your Honor ample authorities along that line.

Mr. Dwight: After all the Court conducts the trial and not the Public Prosecutor. I don't think counsel's remarks need answering. That particular picture is a part of the body. That can be proved

(Testimony of Albert Fraga.)
by the doctor who conducted the autopsy, the only man who is an expert and who can definitely describe any marks on the body. That does not indicate anything. How do I [35] know it wasn't put there by someone else.

The Court: Objection will be overruled.

Mr. Dwight: Save an exception. May I be permitted to cross examine this witness before the Court finally rules on this photograph?

The Court: You may cross examine him.

Cross Examination

By Mr. Dwight:

Q. Mr. Fraga, did you touch the body at any time before you photographed it?

A. Yes, sir.

Q. Did you put any powders on the hand of this deceased before you photographed it?

A. No, sir.

Q. You didn't use any means common to photographers to bring out certain things?

A. No, sir.

Q. You took this picture of the body just as you saw it in the morgue? A. Yes, sir.

Q. You don't know who had handled the man between the time you took the picture and the time he died? A. I don't know.

Q. When did you take this picture?

A. August 4, 1937.

Q. Had an autopsy been performed?

A. No, sir.

(Testimony of Albert Fraga.)

Q. It was taken before the autopsy was performed on the body? A. Yes, sir. [36]

The Court: It will be received as Exhibit "C" in evidence.

(The picture referred to was received in evidence and marked "Prosecution's exhibit C.")

Mr. Dwight: May I save an exception?

The Court: Exception noted.

Mr. Young: No further questions.

The Court: Any further cross examination?

Mr. Dwight: No further cross examination.

Mr. Young: Showing to the jury, now, the Exhibits "B" and "C" in evidence, your Honor.

(Mr. Young handed the pictures, Prosecution's Exhibits "B" and "C", to the jury.)

LOU RODGERS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Mr. Young: Will your Honor excuse me for just a moment? I would like the jury to finish with the exhibits before I question her.

The Court: All right.

Q. What is your name, please?

A. Lou Rodgers.

Q. Where do you live? A. Wahiawa.

(Testimony of Lou Rodgers.)

Q. What street in Wahiawa?

A. Citrus and Olive.

Mr. Young: Will you speak just a little louder, please, Miss Rodgers, and face the jury, [37] please. Just speak up so we can all hear you.

Q. How long have you been living at Wahiawa?

A. Four years.

Q. Do you know a person by the name of Ilene Warren alias "Speed" Warren? A. I do.

Q. How long have you known her?

A. Four years.

Q. Is she in the court-room here now?

A. Yes.

Q. Will you indicate where she is?

A. There (indicating the defendant).

Mr. Young: May the record show the identification?

Q. You know this person by any other names?

A. No, I don't.

The Court: Let the record show the witness identified the defendant.

Q. You just know her by Ilene "Speed" Warren? A. I do.

Q. When did you first meet her?

A. August 24, 1934.

Q. 1934. Did you know her in the year 1936?

A. I did.

Q. There has been some testimony that you were present at her house on June 1, 1936. Do you recall whether or not you were? A. I was.

(Testimony of Lou Rodgers.)

Q. At what place was that? A. Wahiawa. [38]

Q. What place?

A. I can't pronounce the street.

Q. Who was in charge? What kind of a place was it?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial; upon the further ground it is an attempt to put the character of this witness in issue.

Mr. Young: I want to know whether it was a store, hotel or what, your Honor. I submit the question, your Honor.

The Court: Objection overruled.

Mr. Dwight: Exception.

The Court: Exception noted.

Q. What kind of a building was it?

A. A frame building.

Q. Was it a house? A. It was a home.

Q. Do you know whose home it was?

A. Hers (indicating the defendant).

Q. Now, just a little louder, please?

A. Hers (again indicating the defendant).

Q. You mean by "hers" Ilene Warren?

A. Yes.

Q. Do you know from your own knowledge whether or not she owned that place?

A. I know.

Q. You know?

A. I do not know whether she does.

(Testimony of Lou Rodgers.)

Q. You do know she was living there at the time, June 1, 1936, is that correct? A. Yes. [39]

Q. What were you doing at the house at that time?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial. What has that got to do with the issues here, your Honor?

Mr. Young: Does your Honor desire me to make an offer of proof in order to obviate any more objections along these lines?

The Court: No objections to making an offer of proof. The jury will remain in their seats and the Court will step in chambers for that offer of proof.

In Chambers 3:00 p. m.

(Thereupon the Court and respective counsel reconvened in chambers and the following proceedings were had:)

The Court: Just let the record show this is an offer of proof suggested by both the counsel for the Territory and defense, meeting in chambers, not in the presence of the jury.

Mr. Young: We propose to prove by this witness along the line that is being followed now in the examination, that at the time of the police raid, at the time the officer took her into custody with "Speed" Warren, she was a prostitute in the home of "Speed" Warren; she was working for "Speed" Warren as a prostitute on that date, and the purpose of that testimony, your Honor, is to show that

"Speed" Warren at that time built up an animosity towards the police, which later grew and which gave her the foundation and [40] basis leading up to this particular case, the motive and malice. It is circumstantial evidence and we are entitled to show why she barricaded that place, what the foundation was.

Mr. Dwight: If counsel has any statement from Lou Rodgers or if Lou Rodgers will testify that the defendant made any statement concerning this, possibly it would be admissible, provided they could show the corpus delicti.

Mr. Young: She could say whom she worked for.

Mr. Dwight: That has no place in this. You are bringing directly to the jury the character of this defendant; that is just what you are doing.

The Court: Just one minute.

Mr. Dwight: I object to the offer of proof on the ground that the offer of proof is not material to any of the issues raised by the indictment; that the offer of proof directly brings before the jury the question of the defendant's character; upon the further ground that if the offer doesn't offer to prove any statement—that is the difficulty—if they offered to prove a statement of the defendant, that and that alone would be admissible, and that is the only thing they could show to show motive.

(The offer of proof on pages 40 and 41 was read.) (Augument.)

Mr. Young: I will state for the purpose of the record I am going to prove by this wit- [41] ness what I have stated in the record and I will give the Court the assurance at this time that other witnesses will be produced, other than this witness, to show that this animosity began at this time and existed up until the time of the murder.

The Court: In other words, that this witness is merely a part of a general scheme and theory.

Mr. Young: That is right. In other words, to be more frank, "Speed" Warren at that time developed an animosity towards the police. She had determined she was going to keep the police out of her place, if she had to barricade it, so that she could ply her trade. When the police did raid her, she was plying her trade of prostitution, showing a link between the case to her motive and identity.

Mr. Dwight: The only question the Court has to pass on here is the relevancy of a fact and that fact was that on June first "Speed" was running a house of prostitution and on June first this witness was a prostitute in her house. Where is the materiality of that statement?

The Court: The Court is ready to rule. The objection to the offer of proof is overruled. The purpose of this offer is apparent from the offer and is not made to put in issue the character or reputation of the defendant. It is offered as a circumstance in proof of motive, [42] malice and identity.

(Testimony of Lou Rodgers.)

Mr. Young: Malice, motive and identity.

Mr. Dwight: May I save an exception to the Court's ruling?

The Court: You may have your exception.

Mr. Dwight: And may my exception go to her entire testimony?

The Court: Objection and exception noted to this entire offer of proof and testimony.

In Court 3:15 p. m.

(Thereupon the Court and respective counsel reconvened in the court-room and the following proceedings were had and testimony given:)

(The reporter read the last question on page 40, as follows:)

"Question: What were you doing at the house at that time?"

The Court: Will you please answer that question?

The Witness: I don't understand it.

By Mr. Young:

Q. Were you working there?

A. I was living there.

Q. What else were you doing, if anything?

A. Keeping house.

Q. Where did you live at that time?

A. I lived with Ilene Warren.

Mr. Young: Beg pardon?

A. (Repeating) I lived with Ilene Warren.

Q. How did you make your money?

(Testimony of Lou Rodgers.)

Mr. Dwight: I object to that as incompetent, [43] irrelevant and immaterial, your Honor, the question having already been asked and answered.

The Court: Objection overruled.

Mr. Dwight: Note an exception.

The Court: Exception allowed.

Mr. Dwight: Has this witness been informed as to her constitutional rights?

The Court: Will you read the question?

(The reporter read the last question on page 43, as follows:

"Question: How did you make your money?"

By Mr. Young:

Q. In other words, did you do some work there of some kind by which you got some money?

A. Well, I better not answer that.

Q. Why don't you want to answer that?

(There was no answer.)

Mr. Young: I think your Honor should advise the witness.

By The Court:

Q. You say you don't want to answer that question? A. I would rather not.

Q. You say it is because you don't want to incriminate yourself? A. That is right.

(Testimony of Lou Rodgers.)

By Mr. Young:

Q. I understand you refuse to answer that because you claim your constitutional privilege; is that right? A. Yes.

Q. You saw this police officer that left the court- [44] room about the time you came in?

A. Yes.

Q. Did you go any place with him on June 1, 1936? A. Not on June first.

Q. When did you go with him?

A. June second.

Q. Where did you go with him?

A. Police Department.

Q. And who went with you?

A. Ilene Warren.

Q. The defendant? A. Yes.

Q. Any other girls? A. Two others.

Q. Two of you? A. Two other girls.

Q. Do you know what those girls were doing there while in "Speed" Warren's house?

A. No.

Q. You do not. Were they living there with you? A. I don't know.

The Court: Mr. Young, the grand jury desires to make its partial report to me. The jury not having had a recess since two o'clock, the Court will therefore declare a recess and ask them to leave the room, together with all witnesses and all others not connected with the grand jury.

(Testimony of Lou Rodgers.)

Mr. Dwight: I think they can remain; they are making a partial report. [45]

(A brief recess was taken.)

(The reporter read the last question and *and* answer on page 45, as follows:)

> "Question: You do not. Were they living there with you?
>
> "Answer: I don't know."

By Mr. Young:

Q. Do you know whether they were living with you?

Mr. Dwight: Objected to as already asked and answered.

The Court: Objection overruled.

A. They were living in the same house.

Q. Do you know of your own knowledge what they were doing there? A. Yes.

Q. What?

A. You mean going in and out, visiting them.

Q. Now, Miss Rodgers, did you ever have any conversation with "Speed" Warren after the time that you went down to the station, after the police officer Parker took you away from there, did you ever have any conversation with her in regard to the police?

Mr. Dwight: May I ask the Court to instruct the witness to answer that yes or no?

The Court: (To the witness) Answer that yes or no.

(Testimony of Lou Rodgers.)

The Witness: Repeat that again so I can have it plainer.

(The last question was read.)

A. Yes.

By Mr. Young:

Q. What was the nature of that conversation? [46]

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, as calling for hearsay evidence, having no bearing upon the issues in this case.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

By Mr. Young:

Q. Will you tell us that entire conversation, what she said to you?

Mr. Dwight: Fix the date.

Q. When was the time of this conversation?

A. Sometime after the second of June.

Q. About how long, approximately?

A. I don't know; just about two days, possibly a week.

Q. Now, you tell us what that conversation was, what she said to you.

A. Well, she wanted to wire the building up with electricity. She wanted to know what I thought about it so I gave her my opinion. She went down to see her attorney, to see if it would be O. K. Her attorney said he didn't think——

(Testimony of Lou Rodgers.)

Mr. Dwight: I am going to move to strike that answer as incompetent, irrelevant and immaterial, calling for hearsay, unless the witness was personally present.

The Witness: I was.

By Mr. Young:

Q. Miss Rodgers, just before we go to this attorney episode, what else was said in regard to this equipment, this wiring of the house in your presence before she went [47] to the attorney?

A. Nothing, except——

Mr. Dwight: I am going to make a further objection on the ground it is incompetent, irrelevant and immaterial, as compelling this defendant to be a witness against herself, as evidence having been obtained after an illegal search and seizure by the government authorities and it was knowledge obtained in that illegal search that caused this witness to come here to testify. I cite the case of——

Mr. Young: Submit the question.

The Court: Objection overruled.

Mr. Dwight: Exception.

By Mr. Young:

Q. What was the nature of that conversation, Miss Rodgers?

A. Well, she just wanted to know what she had to do to fix the place up on account of burglars and drunken soldiers. In a kidding way I said, "Put some iron bars around the place." She talked

(Testimony of Lou Rodgers.)

over about putting electric wires around the place. She went to consult her attorney.

Q. Did she say that had any relation to the police?

A. Well, yes and no. She didn't offhand say it. She said it would help to get rid of the cops or to keep them away.

Q. That was a few days after the raid?

A. Yes.

Q. Now, did you hear her talk to any other person about this matter, about the wiring of her place and so on? [48] A. Yes.

Q. What persons? A. John Kiehm.

Q. Where did she talk to John Kiehm?

A. I don't remember whether it was at the garage or her house.

Q. It was either one of the two places, you can't remember, is that true? A. Yes.

Q. Will you know John Kiehm if you saw him again? A. Yes.

Mr. Young: (To the Bailiff) Will you call John Kiehm?

(The bailiff responds by bringing into the courtroom a man.)

Q. Look at this gentleman. Do you know who he is? A. Yes.

Q. Who is he? A. John Kiehm.

Q. Is that the same John Kiehm you are testifying about? A. Yes.

(Testimony of Lou Rodgers.)

Mr. Young: (To the person identified) What is your name? A. John Kiehm.

Mr. Young: May the record show the identification of John Kiehm by this witness, if your Honor please?

The Court: Let the record so show.

By Mr. Young:

Q. What did "Speed" Warren say to John Kiehm about this wiring you are talking about? [49]

A. She wanted to know if he could do it if she got the wire and the material.

Q. Is there any other conversation that you remember at that time?

A. No, I don't recall any in my presence at the time she was asking.

Q. You were living with "Speed" Warren at that time? A. I was.

Q. When did you leave her place, if you recall?

A. August 4, 1936.

Q. That is the August following the June that you are talking about, is that correct?

A. Yes.

Q. Now, did you go any place else and hear her talk to anybody else about this wiring?

A. No one else, except an attorney.

Q. Who was that attorney?

A. Charles Dwight.

Q. Who is that attorney?

A. Charles Dwight.

(Testimony of Lou Rodgers.)

Q. Where did "Speed" Warren speak to him?

A. In his office.

Q. Where is his office?

A. Damon building.

Q. You recall the conversation that passed between him and "Speed" Warren in connection with the wiring?

A. She went up and asked him about it. He said he did not think it would do any harm. She said, "Well, we will see about it."

Q. Did she tell him why she wanted the wiring around [50] there?

A. The same reasons she told me.

Q. To keep burglars and the police away and the drunken soldiers, is that right? A. Yes.

Q. These three things? A. Yes.

Q. Now, do you know personally how "Speed" Warren felt about the officers taking her away?

Mr. Dwight: That is calling for the conclusion of this witness. I submit it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

By Mr. Young:

Q. Now, after this—How long after the conversation—I will withdraw the question. Do you know, of your own knowledge, whether after this conversation with Mr. Dwight and after the conversation with Kiehm, do you know of your own knowledge whether any electrical equipment was ever put in

(Testimony of Lou Rodgers.)

that house after you were there? A. Yes.

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial and is compelling the defendant to be a witness against herself.

The Court: Objection overruled.

Mr. Dwight: Exception.

The Court: Exception noted.

By Mr. Young:

Q. Your answer was yes? A. Yes. [51]

Q. Will you please tell us just what you know about that electrical equipment that was put in the house, that was put in there after this conversation with Mr. Dwight and Kiehm, everything you know about it?

A. Well, she bought the wiring. So far as I know Kiehm put it in from the front door over to another door, to the back door.

Mr. Dwight: May my objection and exception run to all this testimony?

The Court: It may.

A. (Continuing) I said when she got the material and everything for this wiring and a steel plate for the door, she got Kiehm down there. They fixed the wiring up from the front door to the back door.

By Mr. Young:

Q. Was there any other device in there that you recall? A. Switch.

Q. Where was the switch located? Do you know?

A. On the stairway going up on the righthand side.

(Testimony of Lou Rodgers.)

Q. That is on the ground floor?

A. As you come in the front.

Q. Now, was there any other equipment that you saw there of an electrical nature?

A. Batteries, I guess it was.

Q. Where was that located?

A. At the top of the door facing—leading downstairs.

Q. Do you know whether or not, from your own personal knowledge, the front door was wired to the switch? A. Yes.

Q. Are you acquainted with all the rooms downstairs [52] in that house? A. Yes.

Q. You know just about where they are located?

A. I did up until the time I left.

Q. Up until the time you left. How many rooms are there downstairs?

A. There is one large living-room and four bedrooms, a closed-in back porch, and a hallway, a small ante-room leading from the front door into the living-room.

Q. Any stairs leading from the ground floor to the top floor?

A. There is one on the lefthand side and one on the righthand side.

Q. As you come in the front door?

A. Yes.

Q. You believe you could draw or sketch a little diagram of this house for us? A. Yes.

(Testimony of Lou Rodgers.)

Q. (Continuing) of the ground floor? Now, Miss Rodgers, I am showing you a map——

Mr. Dwight: I object to the exhibiting of this map or whatever it is to this witness. If this witness wants to draw a plan, the witness can draw a plan. Certainly she has to testify from her own knowledge, but not by having it fed to her by other people.

Mr. Young: If your Honor please, she has given in her testimony the number of rooms, what they were and so on. By the Court looking at this, it will see this is nothing but lines drawn. [53] I am going to ask the witness whether or not this is a correct diagram of what the place looked like to her at the time she was there. I want her merely to illustrate the testimony by this diagram.

The Court: The Court will sustain the objection.

Mr. Young: I guess we will have to draw one, then.

The Court: I suggest a smaller piece of paper.

Mr. Young: I will question the witness further.

Q. Now, Miss Rodgers, are you sufficiently acquainted with the locality where "Speed" Warren lived at this time to place it on a plat or map?

A. Yes.

Q. In relation to the various streets in Wahiawa? A. I think I can.

Q. Will you step down to this board a moment, please? (The witness responds as directed) This

(Testimony of Lou Rodgers.)

is a plat in evidence. Prosecution's Exhibit "A" (indicating on board). This is Kuahiwi Street (indicating), Avacado Avenue, the court house there, the railroad down here, this is Muliwai Avenue (indicating). Now, having those land marks in mind and knowing the names, can you point out about the place where "Speed" Warren's house was on the date you were testifying to?

A. It was on this street up that way (indicating).

Q. In this approximate area. Can you say which lot it was on?

A. Where should the house be?

Q. All we are interested in is if you can point out where "Speed" Warren's house was.

A. Yes. [54]

Q. Will you point to it, please?

A. This place here (indicating on Ex. "A").

Mr. Young: May the record show the witness indicates the lot marked "Marvin Connell"?

The Court: The record may so show.

By Mr. Young:

Q. And it was in the house on the lot that you pointed to where you lived with "Speed" Warren and the other girls that you testified to, is that correct? A. Yes.

Q. Where did you live in the house?

A. When I first came, I lived downstairs, then I moved upstairs.

Q. Was there a maid there? A. Yes.

(Testimony of Lou Rodgers.)

Q. What was her name?

A. A Japanese lady.

Q. Was there any other maid there?

A. Yes.

Q. What was her name?

A. Lucy McGuire.

Q. Would you know that person again if you saw her again? A. Yes.

Mr. Young: (To the bailiff) Call Lucy McGuire.

(The bailiff complies by bringing a lady into the court-room.)

Q. Did you see this lady (indicating same person)? A. Yes.

Q. What is her name? [55]

A. Lucy McGuire.

Q. Is this the maid that you testified to?

A. Yes.

Mr. Young: (To the same person) What is your name? A. Lucy McGuire.

Mr. Young: May the record show the identification of Lucy McGuire?

The Court: Let the record so show.

By Mr. Young:

Q. You say you first lived downstairs. Where did you live afterwards? A. Upstairs.

Q. Where did the other girls stay?

A. Downstairs.

Q. Do you know what those other girls were doing there? A. Yes.

(Testimony of Lou Rodgers.)

Q. What were they doing?

A. Having soldiers visit them.

Q. Soldiers visiting them. Pardon me just a moment. Did you ever have any soldiers visit you?

Mr. Dwight: May it please the Court, may the witness be instructed as to her constitutional rights?

The Court: The witness has already been instructed as to her constitutional rights. You do not have to answer any question if it will incriminate you. You may answer the question.

A. Yes, I had friends.

By Mr. Young:

Q. Do you know where "Speed" Warren got this wire and copper plate that you have testified to? Do you know that [56] of your own knowledge?

A. I can't recall where she got the wire. She got the copper plate from the Hawaiian Steel Iron Works.

Q. Were you with them at the time?

A. Yes.

Q. Did you know what she was buying it for?

A. Yes.

Q. She told you that? A. Yes.

Q. If you saw a picture of "Speed" Warren's house, would you know whether that was the house or not? A. Yes.

Q. I am going to show you some pictures here (handing pictures to the witness). Look at this

(Testimony of Lou Rodgers.)

picture (indicating). Tell me whether or not you know what that is.

A. (Examining same) That is leading into the front door.

Q. Of what?

A. Of "Speed" Warren's house.

Q. Is that the way it looked to you at the time you lived there? A. Yes.

Q. That is just the way it looked to you?

A. It did.

Q. From that view? A. Yes.

Mr. Young: May this be received in evidence?

The Court: Any objection?

Mr. Dwight: Subjqect to my general objection and exception as to all this witness' testimony. [57]

The Court: Prosecution's Exhibit "D" in evidence.

(The picture referred to was received in evidence and marked "Prosecution's Exhibit D".)

By Mr. Young:

Q. I will show you another picture (handing same to the witness). Do you know what that is?

A. (Examining the same) Yes.

Q. What is that? A. Road.

Q. What street is that?

A. I do know but I can't pronounce it.

Q. Which one is it on the map (Ex. "A")?

A. Muliwai.

Q. Is "Speed" Warren's home in that picture?

A. Yes.

(Testimony of Lou Rodgers.)

Q. Will you point to it?

A. (The witness indicates.)

Q. Is that the way it looked to you at the time you lived there? A. Yes, from a distance.

Mr. Young: May this be received in evidence, if your Honor please?

The Court: It may be received in evidence and marked "Prosecution's Exhibit E" in evidence.

(The picture referred to was received in evidence and marked "Prosecution's Exhibit E".)

By Mr. Young:

Q. And, similarly, this picture (handing same to the witness); do you know what that is? [58]

A. (Examining the same) Yes.

Q. What is that?

A. That is a picture of "Speed" Warren's home and garage.

Q. Did it look that way at the time you lived there? A. Yes.

Q. I will show you another picture (handing same to the witness). Do you know what that is?

A. (Examining the same) Yes.

Q. What is that?

A. That is "Speed" Warren's home—yard, rather.

Q. It looked that way at the time you were there, living there? A. Yes.

Mr. Young: May these two also be received in evidence?

(Testimony of Lou Rodgers.)

The Court: They may be received in evidence as Exhibits "F" and "G".

(The pictures referred to were received in evidence and marked "Prosecution's Exhibit F" and "Prosecution's Exhibit G", respectively.)

By Mr. Young:

Q. I am going to show you another picture (handing same to the witness). Have you ever seen that before?

A. (Examining the same) Yes.

Q. Do you know what that is?

Mr. Dwight: Just a moment. I am going to object as incompetent, irrelevant and immaterial—counsel has already exhibited the picture to me—upon the ground, if the Court will examine it, that [59] it is incompetent in this particular case. It is a photograph of something that has been suppressed.

Mr. Young: This, if your Honor please, is something that this witness can testify to, whether this was the condition existing when she was there.

Mr. Dwight: It is attempting to get into evidence indirectly what they cannot do directly. I think the Court better look at that photograph.

The Court: I will have to reserve my ruling on that until I ascertain who took it, when and how.

Mr. Young: May this be marked for identification?

(Testimony of Lou Rodgers.)

The Court: It may be marked for identification. It may be marked Exhibit H for identification.

(The picture referred to was marked "Prosecution's Exhibit H for identification".)

Mr. Young: It will not be exposed to the jury. I would like to have her say what it is.

The Court: It is for identification only at this time.

By Mr. Young:

Q. Do you know what this is? A. Yes.

Q. What is it?

A. "Speed" Warren's front door.

Q. Is that the way "Speed" Warren's front door looked at the time you lived there after she had the conversation with Kiehm and after she had the conversation with Mr. Dwight? [60]

A. It looks similar, although the brass looks a little bit higher up.

Mr. Dwight: I am going to move to strike all this testimony as highly prejudicial. The document has been identified. He is trying to get the substance of the picture in by means of questions and answers. I submit that it is entirely incompetent, irrelevant and immaterial.

The Court: The Court will strike that answer with reference to the highness or lowness of the door,—any description of how the exhibit looked, —and the jury instructed to disregard it until the matter is received in evidence.

(Testimony of Lou Rodgers.)

By Mr. Young:

Q. Did you see any one put anything on that front door?

A. I don't know what you mean.

Q. You testified she got certain wire and a plate and John Kiehm came over there and did some work over there. Did you see John Kiehm do any work on that door?

A. I don't know whether it was him or another.

Q. Was something put on that door after you heard the conversation between Mr. Dwight and Mr. Kiehm? A. Yes.

Q. What was put on that door?

A. Sheet iron, brass. I don't know whether it was brass or sheet iron. I know when I see it.

Q. Was that put on the outside or inside?

A. Outside.

Q. Do you know of your own knowledge whether any electrical wires were attached to that door?

[61]

A. Yes.

Q. Now can you sketch just briefly, if you can, from your recollection what that door looked like as you come in from the outside, about what size that sheet was?

A. Well, it is about the width of this table. (Indicating reporter's table)

Q. About the width of that table?

A. Maybe not as wide.

Q. Maybe not as wide, and about how long?

(Testimony of Lou Rodgers.)

A. About the length of that size, just enough to fit the door.

Q. Just enough to fit the door, did it reach all up and down the door? A. No.

Q. About how far from the bottom did it stop, or was it on the bottom of the door?

A. It was lacking about a foot from the top, then on down.

Q. About a foot from the top, about a foot of space left, then right on down to the bottom of the door?

A. So a person could see out of the top of the door.

Q. Now, to your knowledge, did "Speed" Warren ever put the current through that plate?

A. Yes.

Q. And how did she do that, by doing what?

A. Turning on the switch.

Q. And where was that switch located?

A. On the right hand side of the stairway going up, of the front room.

Q. As you come in the front door to the right hand side, [62] is that right? A. Yes.

Q. How far up the stairs, how far up, going towards upstairs was this switch located?

A. About the height of three steps.

Q. Height of what?

A. Height of three steps going up.

Q. Where was the switch attached, what part of the house was it attached to?

(Testimony of Lou Rodgers.)

A. On the side of the door casing.

Q. On the side of the door casing going upstairs, is that correct? A. Yes.

Mr. Young: There is only about five minutes left. I would like the jury to see these exhibits for the remaining time, if I may show these. Showing the jury, for the purpose of the record, the exhibits marked "D", "E", "F" and "G", you gentlemen please look at those.

(Mr. Young handed the pictures, Prosecution's Exhibits "D", "E", "F" and "G", to the jury.)

Mr. Young: May this witness be excused for the day? I don't believe we have time to question her further. May this witness be excused from the stand and instructed to return?

The Court: Miss Rodgers, you will be excused from the stand and you are instructed to return tomorrow morning at 9:00 o'clock.

Mr. Young: May we have our 4:00 o'clock recess? [63]

The Court: Yes. There will be no afternoon session tomorrow. We have a rather long calendar.

Mr. Young: I have some witnesses, if your Honor will order them to return.

The Court: Bring them in.

Mr. Young: If the Court please, will the Court instruct Lucy McGuire and Mr. John Kiehm to return tomorrow morning at nine o'clock without

(Testimony of Lou Rodgers.)
further order of the Court. (Both witnesses were in the court-room.)

The Court: You two will return tomorrow morning at nine o'clock without further order of the Court. You are subpoenaed to return here tomorrow morning at nine o'clock. You will return here without fail. The Court will announce for the benefit of counsel and the jury we will adjourn until tomorrow morning at nine. There will be no session at all tomorrow afternoon, nor Saturday. You gentlemen of the jury are instructed not to discuss this case with any outside person or with anyone during the recess and adjournment of the Court and not to read the newspapers or any papers or anything whatsoever about this case. If anyone tries to approach you, let the Court know about it. You gentlemen are excused until tomorrow morning at nine o'clock. Court stands adjourned until that time.

(A recess was taken until Friday, February 4, 1932, at nine o'clock a. m.) [64]

Honolulu, T. H., Feb. 4, 1938.

(The trial was resumed.)

Mr. Young: Ready for the Territory.

Mr. Dwight: Ready for the defendant.

Mr. Young: Stipulate the jury and the defendant are present.

(Testimony of Lou Rodgers.)

The Court: Let the record show it is stipulated the jury and the defendant are present and both sides are ready to proceed.

Mr. Young: Your Honor, may I have the assistance of the bailiff of the Court to tack this up. (Referring to a large sheet of paper.)

The Court: Yes, call the bailiff.

LOU RODGERS,

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

(continued)

By Mr. Young:

Q. Miss Rodgers, do you think you could draw this diagram better on a flat table or on the board?

A. Flat table.

Q. Step down here, please. Miss Rodgers, I want you to please draw a diagram as near as you can from your memory as to the general plan of the floor, bottom floor, of the home of Ilene "Speed" Warren at the time that you were there. You understand what I want? Here's a ruler and pencil. (The witness stepped down to the prosecutor's table and Mr. Young handed her a ruler and pencil.) Take your time and draw. May I suggest that you make the house about as square as this ruler so it [65] will be large enough for the jury to see, the general plan of the house, about this long, to scale?

(The witness draws on a piece of paper and resumed the stand.)

(Testimony of Lou Rodgers.)

Q. Miss Rodgers, will you please step down here just a moment? You have drawn a rough plan on this paper.

(The witness steps down to the prosecutor's table.)

Mr. Young: May we mark this, if your Honor please? What is the next letter?

The Court: "I".

Mr. Young: Prosecution's Exhibit "I" for identification?

The Court: All right, it may be marked "Exhibit I for identification."

(The drawing referred to was marked "Prosecution's Exhibit I for identification.")

By Mr. Young:

Q. Pointing to Exhibit "I" for identification, Miss Rodgers, will you kindly explain what this represents? A. The home of Mrs. Warren.

Q. Now, you have various lines drawn through there, what do those represent?

A. Partitions.

Q. In other words, do I understand this is a room, this square here (indicating)? A. Yes.

Q. What room is this?

A. The living-room downstairs.

Q. Living-room downstairs. Now, with reference to this large diagram, which part of this house faces [66] Muliwai Avenue?

A. This side (indicating).

(Testimony of Lou Rodgers.)

Q. This side, and which side of the house is the front door on? A. The same side.

Q. The same side, up here (indicating), is that correct? May we mark this "X-1", the general direction? (Marking on paper.) The front door is where? Will you point where on the diagram?

A. Approximately there.

Q. Approximately there. Now, as you come in the front door,—I believe you testified that this is a two-story building? A. Yes.

Q. As you come in the front door, are there any steps leading to upstairs? A. Yes.

Q. Now, where are these steps located? Will you point them out?

A. This is the front going up the front stairs (indicating) and this is going up the back stairs (indicating).

Q. Going in the front door and the stairs are on your right going upstairs? A. Yes.

Q. How far, approximately, is it, Miss Rodgers, from the door to the beginning of the steps going up on the righthand side, just roughly, how many feet? A. Well, I couldn't say.

Q. Will you point out an object in here, something to show us how far it is from the front door as you come [67] in to the first step on the righthand side? A. Step and a half.

Q. What do you mean by a "step and a half", the steps you take with your feet?

A. The steps you take with your feet.

(Testimony of Lou Rodgers.)

Q. Will you point out some object on the floor just about how far it is from the door as you come in to the first step?

A. From my foot to there (indicating).

Q. About two feet from the door here to the first step, is that correct, approximately?

A. Yes.

Q. Now, with reference to this (indicating), are these stair marks that you have in your diagram, with reference to this (indicating), how are they situated with reference to the front door? Are they just ahead of the front door?

A. Just ahead of the front door.

Q. If you turn to the right, you can take these steps going upstairs also, is that correct?

A. Yes.

Q. Where do these steps lead upstairs?

A. To the kitchen.

Q Where do these steps lead to going this direction to the right (indicating)?

A. Front living-room upstairs.

Q. Front living-room upstairs. Now, yesterday you gave some testimony about a certain switch that was on the right stairway. Will you indicate with a cross about where that switch is located?

Mr. Dwight: May it be understood my objec-[68] tion goes to this testimony today as well as yesterday and save my exception?

The Court: Yes.

(Testimony of Lou Rodgers.)

By Mr. Young:

Q. Put a cross about where that switch is located. A. (The witness marks on paper).

Q. That cross there represents the switch, and approximately how far would that switch be from the door as you come in on the righthand side; as you come in the door, how far would that switch be to your right?

A. Well, I couldn't say.

Q. We just want a rough idea. We want a rough idea. Can you point out some object, indicating the distance?

A. About this height (indicating).

Q. About that height off the floor?

The Court: Indicating what?

Mr. Dwight: Let us have that measure.

The Court: Indicating what?

Mr. Young: The top of the post (of the jury box.)

Mr. Dwight: About four feet.

Mr. Young: I suppose about four feet.

The Court: Stipulated about four feet to the top of the rail, top of the post of the jury rail.

By Mr. Young:

Q. And about how far going to your right, the distance? A. Not very far.

Q. What *to* you mean by "not very far"?

A. About half a room length.

Q. That is, standing in the door, could you reach the [69] switch? A. Yes.

(Testimony of Lou Rodgers.)

Q. Standing in the front door, you could reach the switch, reaching out that way (demonstrating)?

A. Yes.

Q. That is to your best recollection?

A. Yes.

Q. Now, what, briefly, are these rooms you have here? (Indicating) A. Bedrooms.

Q. Bedrooms, downstairs bedrooms?

A. Yes.

Q. How many of them were there?

A. Four.

Q. What does this represent here (indicating)?

Mr. Dwight: Will you indicate the line drawn between the foot of the front steps back? I mean this line here (indicating).

A. It doesn't represent anything.

By Mr. Young:

Q. What does this space here represent between this door and the stairway here (indicating)? This is the stairway (indicating). You had a door marked over here (indicating). What does this space represent (indicating)?

A. Well, it don't represent anything. There is not anything there.

Q. What do you mean,—it is not a room, it is a hallway or what?

A. There isn't anything there.

Q. Now, can you go directly from the front door into [70] the living-room? A. Yes.

(Testimony of Lou Rodgers.)

Q. Is there any door between the living-room and the front door? A. Yes.

Q. You have a door marked on there (indicating). Is that about where the door is? A. Yes.

Q. Now, you testified yesterday, Miss Rodgers, that there was some electrical equipment in some other room. Do you know where that was with reference to this diagram?

A. Over this door here (indicating).

Q. Over this door here. May we mark this "X-2"? (Marking on diagram) That is where there was some other electrical equipment? A. Yes.

Q. Over that door. Now, you said yesterday that the wires ran to the front door and the back door. Was that not your testimony? A. Yes.

Q. Where was the back door located that you are talking about?

A. About here (indicating on diagram).

Q. Down about here, the back door?

A. Yes.

Q. And this is the front door that you were talking about also? A. Yes.

Q. You know of your own personal knowledge there were wires leading to that door? [71]

A. Yes.

Q. Now, were there any windows upstairs on the second floor in about this vicinity, indicating the top of the stairs on the righthand side, for the purpose of the record? A. One.

(Testimony of Lou Rodgers.)

Q. Do you know whether or not you could see from that window down, if you were up there looking down, outside the front door? Do you recall?

A. Yes.

Q. You could? A. Yes.

Mr. Young: I think that is all. Take the stand, please. (The witness resumes the witness stand.)

Q. Now, you gave certain testimony yesterday about overhearing a conversation between Mr. Dwight and the defendant in this case. Approximately how long was that after the police took you from that home about June 1st or the 2nd of June?

A. About a week; maybe two days.

Q. About a week? A. Yes.

Q. You are absolutely sure of that conversation that you testified to? A. Yes.

Q. And that took place in his office?

A. Yes.

Q. Now, after the electrical equipment was put in by Kiehm, was there ever a change made in that, that you know of? Did Kiehm ever come around and do anything about it? [72] A. Yes.

Q. What did he do the second time he came?

A. He fixed the transformer.

Q. He fixed the transformer. Where was the transformer located, Miss Rodgers?

A. On top of the door leading into the living-room downstainrs.

(Testimony of Lou Rodgers.)

Q. Is that the place I marked "X-2" on the diagram? A. Yes.

Q. That was above the door? A. Yes.

Q. And do you remember what that transformer looked like? A. Yes.

Q. Can you describe it to us from your memory?

A. It was a black frame, like a box.

Q. About how big was it? Will you step down to the board, if you can draw about the size of that transformer with a pencil on the board, to your best memory? Just draw a square, whatever shape it was, about the size it was.

A. (The witness steps down to the board and draws on paper.)

Mr. Young: May we mark this square "transformer", your Honor? (Marking)

The Court: Yes, you may.

By Mr. Young:

Q. You say he fixed this transformer the second time he came back?

A. Not that one, but he had a small one there at first. [73]

Q. He had a small one in at first? A. Yes.

Q. Do you know what kind of a transformer that was? A. No, I don't.

Q. When he came back he did something with this large transformer, is that correct?

A. Yes.

Q. Did "Speed" Warren ever tell you not to touch that switch?

(Testimony of Lou Rodgers.)

Mr. Dwight: I am going to object upon the ground the question is leading.

Mr. Young: I will withdraw that question. No further questions.

The Court: Question withdrawn. May I ask just one question?

By the Court:

Q. You have drawn that transformer. Is that the size? What are the dimensions? It is square. How many feet or inches long or wide?

A. I imagine it is about six inches long, about 2½ inches wide.

Q. Six inches long and 2½ inches wide?

A. Yes.

Mr. Dwight: Are you through?

Mr. Young: Yes, I am all through.

Cross Examination

By Mr. Dwight:

Q. Miss Rodgers, yesterday shortly after you took the stand we had a recess. Do you recall that? [74]

A. Yes.

Q. And you were taken into another court-room by Mr. Jardine? A. I was.

Q. Did you talk about your testimony that you were to give in this case at that time?

A. Yes.

Q. Did he tell you what to testify to?

A. No.

(Testimony of Lou Rodgers.)

Q. What was the nature of the conversation?

A. Because I made a mistake.

Q. He told you that you had made a mistake?

A. No.

Q. Well, what did he say? Will you speak out so the jury can hear you?

A. Well, it was about those two girls that happened to be living in the same place that I was.

Q. What is that again?

A. It was about those two girls that happened to be living in the same place that I was.

Q. Is that what he said to you?

A. No, he just asked me to tell the truth about it.

Q. He just asked you to tell the truth about it?

A. Yes.

Q. And did he tell you that you were not telling the truth on the stand? A. No, he did not.

Q. Did he give you any reason for telling you to tell the truth?

A. I don't understand you. [75]

Q. Why did he tell you to tell the truth?

Mr. Young: I object to this as calling for a conclusion of the witness and hearsay. I object to this as calling for hearsay testimony, calling for a conclusion of this witness as to what took place in somebody else's mind.

Mr. Dwight: May it please the Court, this is cross-examination.

(Testimony of Lou Rodgers.)

The Court: The Court will sustain the objection as to the form of that question, as to why he asked those questions.

By Mr. Dwight:

Q. What did Mr. Jardine say, his very words?

A. Who is Mr. Jardine?

Q. This gentleman who took you (indicating Mr. Jardine.)

A. He wasn't the only one took me there.

Q. He wasn't the *one* one took you there. Mr. Young took you there, too? A. Yes.

Q. What did Mr. Young say to you, if anything?

A. He said to go—to testify as to what I was supposed to.

Q. Is that what he said to you, go ahead and testify to what you are supposed to testify to? Is that what he said?

A. Well, he wanted to know if someone was talking to me. He wanted to know what I was trying to do, double cross him, I said no.

Q. What else? [76]

A. Nothing.

Q. Speak out loud so that I can get your answers down as well as the Court Reporter. What else did he say to you? A. That is all.

Q. That is all. He asked you if you were double-crossing him?

A. Not exactly. He said, "What are you doing, trying to double-cross?"

(Testimony of Lou Rodgers.)

Q. Did he offer you any immunity for testifying A. I don't understand what you mean.

Q. Did he tell you if you testify here and incriminate yourself, he would not prosecute you?

A. No, he did not.

Q. Did Mr. Jardine make that statement to you?

A. No.

Q. That is all that happened?

A. That is all that happened.

Q. How long were you in that room?

A. Possibly about a second.

Q. You mean in the judge's chambers, about a second? A. About that time.

Q. You recall my pushing on the door and the conversation ceasing? A. No.

Q. You don't? A. No.

Q. Now, Miss Rodgers, you say you have known "Speed" for four years? A. Yes. [77]

Q. And how long did you live with "Speed"?

A. Two years, outside of two months and a half, taking a trip to the States.

Q. When did you go to the States?

A. March the 16th.

Q. March 16 of what year?

A. 1935, 1936—wait—1936.

Q. March 16 of 1936. Were you in my office prior to that time of your departure for the Coast?

A. Yes, I was.

Q. And do you recall the nature of your visit?

A. Yes.

(Testimony of Lou Rodgers.)

Q. That was in connection with an accident, wasn't it? A. Yes.

Q. That is all that happened, I prepared a suit for you and you signed it? A. I did.

Q. And what time of the year was that?

A. The first one was in October.

Q. When did you first come in?

A. In where?

Q. In my office.

A. All I can recall was about that accident.

Q. And what month was that?

A. If I am not mistaken, it was October.

Q. Of what year?

A. Well, it is before I left for the States.

Q. Aren't you a little bit mixed up on that, Miss Rodgers? [78]

A. Well, I can't say offhand.

Q. You had an accident on October 27, did you not?

A. I could not say the date; I know it was October.

Q. You were confined in the hospital for some period of time, were you not? A. Yes.

Q. After you were discharged from the hospital you came to me to bring suit. Do you recall that?

A. I did.

Q. Now, does that refresh your memory as to when you came into my office?

A. Well, that is all I can think, about then.

(Testimony of Lou Rodgers.)

Q. Was it about December 16, 1935, that you first came into my office in company with a Japanese boy, who was a so-called witness to this accident?

A. I didn't go in the office with him.

Q. You didn't; and at that time did Mrs. Warren accompany you? A. Well, I don't recall.

Q. You don't recall. Shortly thereafter you signed a bill of complaint, didn't you?

A. Yes, sir.

Q. Then you went away? A. I did.

Q. You signed the bill of complaint on the 20th of December in my office?

A. I don't recall that.

Q. Did you ever come into my office after you signed that bill of complaint?

A. I don't remember. I have been up there several [79] times but never did see you.

Q. You never saw me?

A. I have been there lots of times, you were busy or out.

Q. I am speaking of the times when you came in and had conversations with me after you signed the suit on the 20th of December. Did you ever come back into my office again? That is the 20th of December, 1935?

A. Well, offhand speaking, I don't remember.

Q. You recall, however, being arrested or taken to the police station by police officers around the first of June? A. Of what year?

(Testimony of Lou Rodgers.)

Q. Of 1936. I will withdraw that question. You say you left on March 16 and went to the Coast?

A. Yes.

Q. When did you return to Honolulu?

A. On the 22nd of May.

Q. On the 22nd of May, and when did Mr. Parker, the police officer, take you to the police station? A. The second of June.

Q. The second of June, and you say you remained at the police station on the 2nd of June?

A. Yes, overnight.

Q. Overnight. Did you see me at all on the 2nd of June or the 3rd of June? A. Yes.

Q. Where? A. At the police station.

Q. At the police station? [80] A. Yes.

Q. You are sure about that? A. Yes.

Q. You know who bailed you out?

A. No, I don't.

Mr. Young: If your Honor please, I think we have gone a little too far afield. It is incompetent, irrelevant and immaterial who bailed her out.

The Court: Objection overruled.

By Mr. Dwight:

Q. You know who bailed you out?

A. I do not.

Q. After you were discharged from the police station did you ever come into my office?

A. Yes.

Q. When was it?

(Testimony of Lou Rodgers.)

A. I don't recall what date or how many days later.

Q. Did you come in with anyone?

A. Ilene Warren.

Q. And that was the first time you came into my office after your arrest on June 1st or June 2nd, isn't that correct?

A. I don't know what you mean.

Q. That is the first time you came into my office after you were arrested or taken to the police station on either June 1st or June 2nd? A. No.

Q. When did you come into my office before that? A. When the accident happened. [81]

Q. I am not talking about the accident. I am talking about the time after June 1st when you came in. It was on June 4th, was it not?

A. I can't recall what time it was.

Q. And what was the nature of your visit, then?

A. Well, if I am not mistaken it was for bail money.

Q. Concerning your bail? A. Yes.

Q. That is correct. Was there any conversation at that time about the case or was it just concerning the bail?

A. Well, I don't remember.

Q. Did you come in again concerning this particular case that you were involved in?

A. Well, I can't say that either because I don't remember.

Q. You don't remember? A. No.

(Testimony of Lou Rodgers.)

Q. When did you come into my office and have this conversation with me that you testified to on direct examination?

Mr. Young: There is no evidence that she had a conversation.

By Mr. Dwight:

Q. When Mrs. Warren had a conversation with me when you were present?

A. Conversation about what?

Q. You remember testifying on direct examination about a conversation Mrs. Warren had with me in my office? A. Yes, I did. [82]

Q. When did that occur?

A. Well, I can't say whether it was two days after the arrest or a week but it was a conversation.

Q. Now, you have testified about what happened two days after your arrest that was concerning the bail money; now you said you came into my office again; do you know what date you came in?

A. No, I don't.

Q. Maybe I will refresh your memory. Do you remember when the case was set in the Wahiawa court for trial, what date?

A. I know it was on Friday; I don't know what date.

Q. That was the 9th. Your case was originally set for the 9th, wasn't it?

A. Well, I don't know what date Friday came on.

(Testimony of Lou Rodgers.)

Q. And were you in my office the day preceding the date the case was set for trial?

A. Would you mind asking me that question again.

Q. Were you in my office on the day preceding the date, the day before the date that the case was set for trial in the Wahiawa court?

A. I think I was.

Q. And was anyone else with you?

A. Mrs. Warren.

Q. Or were you alone?

A. Mrs. Warren was with me.

Q. Mrs. Warren was with you, and did you talk to me on that date?

A. Well, I didn't talk to you—she did—any more than to say good morning. [83]

Q. Did you say anything to me on that date?

A. She did all the talking; that I can remember.

Q. You never gave me the facts in the case on that day? A. What facts?

Q. Your participation in this incident that brought about your arrest. You were the only one involved in it, isn't that correct?

A. Yes, I was.

Q. Mrs. Warren wasn't involved in that incident, isn't that correct?

Mr. Young: I object to that as incompetent, irrelevant and immaterial, not proper cross-examination. If counsel wants me to go into that incident, I submit——

(Testimony of Lou Rodgers.)

The Court: You have your redirect. Objection overruled.

By Mr. Dwight:

Q. Will you answer the question?

A. Well, as I say she did most of the talking of what happened at that time.

Q. Isn't it a fact, Miss Rodgers, that you were the one that was involved in the matter?

A. Well, even if I was, she was the one did all the talking.

Q. Please answer my question yes or no; is that correct? A. Yes.

Q. And did you not on that occasion tell me what you did on that occasion in connection with that incident?

A. I might have; I don't know. [84]

Q. You don't remember? A. No.

Q. And isn't it a fact, Miss Rodgers, that the other two girls were not involved in this particular incident that you were taken to the police station for?

A. They were taken to the police station the same time I was.

Q. They were not involved in it at all; it was you involved in the incident, isn't that fact correct? A. Yes.

Q. And you don't recall telling me the story of your participation in this incident?

A. No, I don't.

Q. You don't? A. No.

(Testimony of Lou Rodgers.)

Q. Now, was that the time that this conversation that you talk about, this alleged conversation, took place? A. What conversation?

Q. That you told Mr. Young about Mrs. Warren talking to me about barricading the house against robbers and soldiers.

A. Yes, I did not say it was that day I went up to pay my bail money; it was right afterward.

Q. Was it the day I am talking about when you gave me the facts concerning your participation in this case? A. No, it was not.

Q. Were you ever in my office any time after the 8th of June, 1936? A. Yes. [85]

Q. When?

A. I didn't say when, how many days after, but it was shortly after the arrest.

Q. Shortly after the arrest?

A. After the trial was over.

Q. I might refresh your memory. You were in my office after June 8th. A. Yes.

Q. And that was on the 11th of September, 1936? A. No.

Q. You deny that? A. I do.

Q. You were in my office on one occasion after June 8th, isn't that correct? A. Yes.

Q. And that was in September? A. No.

Q. On the 11th of September, 1936?

A. I might have paid you a visit but you weren't in.

(Testimony of Lou Rodgers.)

Q. You spoke to me on that occasion?

A. I don't recall.

Q. You don't recall. And that was the last time you were in my office, isn't that correct?

A. Well, I have been in your office but you were not in.

Q. I am only referring to instances when you came in and conferred with me; that is all. I am not talking about instances when you might have been in my office and I wasn't in.

A. I don't remember of being there.

Q. When did you leave Mrs. Warren's home? [86]

A. Fourth of August.

Q. Fourth of August of what year?

A. 1936.

Q. Are you sure about that?

A. Well, as near as my recollection, it was.

Q. Is that just a guess? A. No.

Q. Now, Miss Rodgers, after you left Mrs. Warren, where did you go?

A. I stayed in Wahiawa.

Q. Stayed in Wahiawa. Where did you live?

A. Several places.

Q. Subsequent to leaving Mrs. Warren's home and establishing a place in Wahiawa, were you ever convicted of a crime? A. Yes.

Q. That crime was prostitution? A. Yes.

Q. Running a disorderly house? A. Yes.

Q. How many times were you convicted?

(Testimony of Lou Rodgers.)

A. Twice.

Q. Twice. You are a registered prostitute, are you not, for the police department?

Mr. Young: I object to that as incompetent, irrelevant and immaterial. Your Honor, counsel has no right to go into this matter. It has not been brought out about registered prostitutes.

Mr. Dwight: I submit the question. I submit it is proper cross-examination. [87]

The Court: Objection overruled. Answer the question.

By Mr. Dwight:

Q. Will you answer the question? A. Yes.

Q. And you are operating a house of prostitution in Wahiawa, isn't that correct? A. Yes.

Q. Now, Miss Rodgers, you testified on direct examination that this apparatus was—that you and Mrs. Warren had a conversation concerning the installation of some apparatus to protect you against robbers, drunken soldiers and police officers. Yes and no, that was your answer?

A. That was.

Q. Now, when did that conversation take place?

A. Well, first at home.

Q. When? A. I don't remember when.

Q. Can you give us some date? A. No.

Q. Was it after the time you were taken to the police station on the first or second of June?

A. It was.

(Testimony of Lou Rodgers.)

Q. Or before? A. It was after.

Q. It was after, and had you been robbed?

A. I was.

Q. On how many occasions?

A. Once in her house.

Q. Once in her house, and did you report it to the [88] police? A. Yes, sir.

Q. Did they do anything about it and catch the burglar?

A. They came up and took finger prints and didn't do anything else.

Q. They took finger prints and didn't do anything else, and that robbery took place before you had your conversation with Mrs. Warren about installation of an apparatus? A. It was.

Q. Had you been bothered by drunken soldiers?

A. Yes.

Q. On numerous occasions? A. Yes.

Q. Did the police ever assist you in quelling the disturbances?

A. The police at Wahiawa did that.

Q. Did they ever come down and put a stop to the disturbances from the drunken soldiers?

A. The MP's did.

Q. You didn't get any help, you couldn't get any help from the Wahiawa police? Please answer my question yes or no.

A. You could, if you called for them.

Q. Did you call for them? A. I did not.

Q. Did Mrs. Warren call for them?

(Testimony of Lou Rodgers.)

A. Called for the MP's.

Q. How many times have you been disturbed by [89] drunken soldiers down there?

A. Well, numerous times.

Q. Speak a little louder, please.

A. Numerous times.

Q. Numerous times. This all transpired or occurred before your conversation with Mrs. Warren?

A. Did what?

Q. The bothering of your quiet and peace by drunken soldiers occurred before you talked to Mrs. Warren? A. About what?

Q. About the installation of equipment.

A. Yes.

Q. And up to the time that you and Mrs. Warren spoke of this installation you were the only one that was ever involved in any incident with the police, isn't that correct?

A. I don't know what you mean.

Mr. Dwight: I will ask the Reporter to read the question.

(The last question was read.)

A. During the time that I was there?

Q. Yes, during the time that you were there. Now, what did you mean, Miss Rodgers, by your answer on direct examination when counsel, when Mr. Young asked you, "And this apparatus was to keep the police out?" and your answer was, "Yes and no"? Now, what did you mean by that,—yes for you and no for Mrs. Warren?

(Testimony of Lou Rodgers.)

A. Well, it wasn't exactly meant for either one, yes and no. It was mostly for her protection, for her own building and house. It wasn't for me. [90]

Q. And you were the only one ever involved with the police?

A. I just happened to be the unfortunate one.

Q. Now, after having gone over this agreement for some time, now can you tell me when you had your first conversation with Mrs. Warren concerning the installation of electrical equipment?

A. Well, it was after June 2nd.

Q. It was after June 2nd? A. Yes.

Q. How many days? A. I don't know.

Q. Now, what did you say to Mrs. Warren and what did Mrs. Warren say to you?

A. She wanted to put the electricity on the doors. I was kidding; I told her to put iron bars on the door. She said she was going to ask Charlie Dwight, her attorney, what to do about it, if they could do anything to her.

Q. When did that conversation occur?

A. It was after the arrest. It might have been that same night; I don't remember.

Q. Did that conversation occur before or after the 8th of June or the day of your trial? It was in between the time of your arrest and the time of your trial? A. Yes.

Q. Your trial was continued?

A. To my knowledge, it was.

(Testimony of Lou Rodgers.)

Q. It was set for one day and it was continued, isn't that correct? A. It was. [91]

Q. And the only time I saw you outside of this instance that you have referred to is when I appeared in court and you were already in court when I got to the Wahiawa court? A. What.

Q. When I got to the Wahiawa court you were already there? A. Yes.

Q. You know what happened?

A. Well, you was our counsel.

Q. You had a trial down there?

A. No, not yet. It is still pending, as far as I know.

Q. You don't know that it has been dismissed?

A. I do not.

Q. You weren't tried at all down there, isn't that a fact?

A. I was down there. There was never any trial.

Q. Don't you remember there was a jury demanded in your case? A. I do not.

Q. And the prosecution dropped it?

A. I do not.

Q. You know the other girls were dismissed?

A. I do.

Q. That was the incident that I was referring to growing out of this incident of June 1st or 2nd, that case at Wahiawa? A. It was what?

Q. The case in Wahiawa arose as a result of that [92] incident of June 1st or 2nd, isn't that correct?

(Testimony of Lou Rodgers.)

A. You came out there for that same reason June 2nd.

Q. What was that again?

A. You came out there when the trial was going on June 2nd.

Q. Now, Miss Rodgers, getting back to the time that you stated that this conversation took place between Mrs. Warren and myself, what did "Speed" say? A. About what?

Q. What? A. About what?

Q. About this conversation with me that you testified to here about locking the house up.

A. Well, we went to your office and she asked you about it.

Q. What did she say about it?

A. She asked you how about wiring the building up and what they could do to her.

Q. She said how about wiring the building up?

A. And what they could do to her and you said you didn't think they could do anything.

Q. That is the whole conversation?

A. Well, that is what she came there for.

Q. Is that all that happened?

A. She said that and she said, "Well, I think we will go and do it."

Q. Did I say anything?

A. You said "Okay", that is all.

Q. When did she ask me that question?

A. Speaking offhand, I don't know what date it was.

(Testimony of Lou Rodgers.)

Q. No, no, I am not talking about the date. In [93] relation to the conversation, were you both in my office? A. I was there.

Q. Have you ever noticed when you and Mrs. Warren were in my office what the condition of the doors were? A. You have two offices there.

Q. I am talking about the doors between the two offices. A. They were shut.

Q. Have you ever been into my office with Mrs. Warren and the door was shut? A. Yes.

Q. When was that?

A. Most of the time.

Q. Now, that is all that transpired,—she said, "I think I am going to wire this place" and I said, "I don't think they could do anything to you" and she said, "I am going to do it," and I said, "Okay"?

A. That is all I heard.

Q. You recall testifying yesterday as to the nature of the conversation? You know what you said yesterday?

A. The same thing as I say now.

Q. Do you recall yesterday when counsel asked you as to the conversation you said that Mrs. Warren asked me about equipping the place to prevent drunken soldiers and robbers and police—you answered yes and no—from coming to the house; did Mrs. Warren make that statement?

A. Yes, sir.

Q. To me?

(Testimony of Lou Rodgers.)

A. That is what was in the conversation about the wiring. [94]

Q. That is what I want to get,—what was Mrs. Warren's conversation, what words did she use and what words did you use?

A. I used the words yesterday she wanted to wire the place up for drunken soldiers and burglars——

The Court: The Court will take a short recess.

Mr. Dwight: May we have the rest of the answer?

Q. What else was there?

A. (Continuing) —and the policemen.

The Court: Court will take a short recess.

(A brief recess was taken.)

(The last question and answer were read.)

By Mr. Dwight:

Q. And you told her that would be a good idea?

A. After you consulted her.

Q. I am speaking of your conversation.

A. A good idea of what?

Q. Your conversation when Mrs. Warren first spoke to you about the installation of equipment. You have already testified about Mrs. Warren's language. What did you say?

A. Well, I said it would be a good idea to put iron bars on the place.

Q. Did you say anything about electricity?

A. No.

(Testimony of Lou Rodgers.)

Q. You said it would be a good idea to put iron bars. Now, Miss Rodgers, did you talk to Mr. Kiehm yourself? A. When?

Q. At any time. A. No.

Q. You were present. Were you present at a conversa- [95] tion between Mrs. Warren and Kiehm? A. I don't recall.

Q. Kiehm, the man that you identified yesterday?

A. Well, I don't recall of going down there at the garage.

Q. You don't know what conversation took place between Mrs. Warren and Kiehm?

A. Well, at the house I do; yes.

Q. All right, what happened at the house? First, when did that conversation take place?

A. Well, I don't know what date.

Q. Can you give us some idea in relation to June 1st?

A. Well, it is somewhere around in a week's time that she was talking to him about it after she talked to you.

Q. It was after she talked to you?

A. Yes.

Q. And about a week's time after she talked to you? A. Yes, something like that.

Q. And when did she talk to you first? Let us get this time straightened out.

A. She was talking to me when we were in jail mostly and afterwards when we was down at your office.

(Testimony of Lou Rodgers.)

Q. That is the only time she talked to you about it, when she was in my office?

A. Well, it was after we came out of jail, when we got home.

Q. In other words, when did you get out of jail?

A. The 3rd of June.

Q. The 3rd of June and you went home?

A. Yes. [96]

Q. You didn't come to my office?

A. I don't recall of going there.

Q. Are you sure you didn't come to my office?

A. I don't remember.

Q. Well, anyway, you went home and when in relation to that time after you got home, how long after in days or hours did you have your conversation with Mrs. Warren?

A. Well, it was during the trip going home the previous day.

Q. You mean when you were in jail you talked about it? A. Yes.

Q. Were you kept in separate cells or were you kept together?

A. In one dormitory together.

Q. In one dormitory together. You had a conversation in jail; what was that conversation?

A. Mostly of the raid and how she was going to fix the house.

Q. And what did you say, what part did you take in the conversation?

(Testimony of Lou Rodgers.)

A. Same as I stated yesterday.

Q. What did you say?

A. About putting those iron bars on.

Q. And that is while you were in jail?

A. Yes.

Q. And while you were held for investigation?

A. Yes.

Q. And before anybody could talk to you, isn't that correct? [97] A. Yes.

Q. So the first conversation, as I understand it, occurred before you came to my office and while you were in jail? A. Yes.

Q. When did the second conversation occur between you and Mrs. Warren?

A. It was after we got out of jail.

Q. And that took place at Wahiawa?

A. Yes.

Q. And that took place at Wahiawa?

A. Yes.

Q. And how many days after you got out of jail?

A. I think it was a couple of days; I am not sure.

Q. A couple of days. Then how many days after that you say you came to my office and had a conversation? A. Possibly a week.

Q. Possibly a week? A. After the trial.

Q. After the trial? A. Yes.

Q. You are sure about that? A. Yes.

(Testimony of Lou Rodgers.)

Q. This conversation you say took place in my office one week after your trial?

A. I don't say it is exactly a week; it was somewhere around about a week.

Q. About a week after the trial, and when did you or Mrs. Warren speak—when did you see Kiehm?

A. About the same time; she did, not me.

Q. Well, were you present?

A. I don't remember being present. [98]

Q. You don't remember being present. You cannot testify definitely that Mrs. Warren spoke to Kiehm? A. No, I cannot.

Q. You cannot because you didn't see them talk?

A. I don't remember of being with them.

Q. You can't tell us what the conversation was?

A. No.

Q. Mr. Kiehm, as far as you were concerned, is out of the picture; at least, you didn't hear any of the language used by Mrs. Warren or by Kiehm?

A. No.

Q. Now, when did you see Kiehm in the house?

A. Well, I don't know just when he was there but he was in there off and on. She had him do odd jobs for her.

Q. He was an electrician?

A. Mechanic and electrician, I guess.

Q. You say he had been in on several occasions doing odd jobs? A. Yes.

(Testimony of Lou Rodgers.)

Q. When did you see him putting in this wiring?

A. After we got the sheet of metal.

Q. You were present when the metal was bought? A. I was.

Q. And when did—do you recall the date when the metal was bought? A. I can't.

Q. You have no idea? A. I can't.

Q. It was purchased from the Honolulu Iron Works? [99] A. It was.

Q. You know what month it was purchased in?

A. June.

Q. Are you sure of that?

A. To my recollection.

Q. How many days after the purchase did you see Kiehm around the house?

A. Well, I just don't remember.

Q. What is that? A. I don't remember.

Q. You don't remember that? A. No.

Q. You remember he was busy around there. You testified on direct examination he put one transformer in and by and by put another one in?

A. Yes.

Q. You were present at that time?

A. Yes.

Q. You recall one of those transformers were put in?

A. It was in June but I don't know what date.

Q. You don't know what date. You never talked to Kiehm?

(Testimony of Lou Rodgers.)

A. I did while he was around the house fixing the wire.

Q. What statements did he make?

A. Well, I just don't remember what the conversation was, mostly about the wire.

Q. You were bitten by that wire?

A. I was.

Q. You got sort of a vibration? [100]

A. I did.

Q. You tested the equipment? Answer my question yes or no. A. First?

Q. Did you test the equipment?

A. Well, I don't know what you mean.

(The last answer was read.)

Q. You understand that?

A. Yes, I tested it.

Q. You got the electricity out of it?

A. Certainly.

Q. How many times did you test it?

A. Once.

Q. You have to throw the switch?

A. You do.

Q. You say that switch was located about three or four feet off the ground and to the left of the door looking out?

Mr. Young: To the right of the door.

Mr. Dwight: To the left, looking out.

Mr. Young: It is confusing to this witness.

(Testimony of Lou Rodgers.)

By Mr. Dwight:

Q. The switch was located on the right going in?

A. As you come in the front door.

Q. And on the left as you go out?

A. Yes.

Q. And it is situated in a position about three or four feet off the ground?

A. Well, to my knowledge and measurement.

Q. Now, you made a statement, did you not, to the [101] Police Department concerning this matter? A. When?

Q. When were you first questioned about this case? I will withdraw the last question.

A. Well, it is the same time Mrs. Warren was in jail after the electrocution.

Q. Well, you were questioned the day following and the day after that?

A. I was only down there once.

Q. And you were at Captain Hays' office?

A. I was.

Q. Were you in Captain Levi's office out at Wahiawa?

A. The only time I was there was when he sent for me.

Q. I happened to be there and you saw me there, isn't that correct?

A. I happened to be there but I did not see you.

Q. The first time that you ever gave any statement to the police authorities was subsequent to

(Testimony of Lou Rodgers.)

the death of Wah Choon Lee, isn't that correct, after that?

A. It was while Mrs. Warren was in jail. I don't know.

Q. It was after the death of Wah Choon Lee?

A. Yes.

Q. And you were questioned in the police station by Captain Hays? A. Yes.

Q. And at that time Captain Hays exhibited to you certain electrical equipment? A. Yes.

Q. And every question that he asked you was based upon that electrical equipment, wasn't it? [102]

A. Yes.

Q. Now, that statement was reduced to writing, wasn't it? A. Yes, some of it.

Q. You remember the question Captain Hays asked you, "What has Charlie Dwight got to do with this?" A. I don't remember.

Q. You don't remember that question, like a bolt out of the blue? You remember that?

A. No, I don't.

Q. You remember telling Captain Hays that you and Mrs. Warren were in my office and that you and Mrs. Warren were leaving my office and walking through the door and out into the hall when Mrs. Warren says, "I am going to electrify that place", and I says, "Okay by me"? You remember making that statement?

(Testimony of Lou Rodgers.)

Mr. Young: I have no objection to the statement being made to the witness if it is for the purpose of impeaching this witness. If it isn't, it is incompetent, irrelevant and immaterial.

Mr. Dwight: It is for no other purpose than to impeach her. Will you answer my question?

A. I don't remember of ever saying that.

Q. You deny you made a statement to this effect, that "Speed" Warren and you were in my office?

A. If I made it to Captain Hays?

Q. To the police, a statement, they got it in writing? A. I don't remember.

Q. And that as you and Mrs. Warren were leaving my [103] office Mrs. Warren said, "I am going to electrify the house" and I said "Okay by me" and that was the only conversation took place in my office. Do you remember making that statement to the police? A. When?

Q. In writing, and you signed it. Don't you remember it? A. I remember it.

Mr. Young: I submit the statement be given to the witness. The witness has a right to see that statement before a foundation can be laid for impeachment. That is the rule.

Mr. Dwight: I can ask her if she made a different statement at some other time. If she denies it—

Mr. Young: I will do you one better. I will give you the statement with the condition that you read the whole statement to the jury.

Mr. Dwight: I will ask the government to produce the statement.

Mr. Young: I will give the statement upon that condition.

Mr. Dwight: I made the motion to compel the prosecution to produce the statement.

Mr. Young: I can furnish the Court. We do not have to give our private papers.

Mr. Dwight: Counsel has come in here time and time again. He says, "I have the authorities."

Mr. Young: Counsel is making the motion. The burden is on him. [104]

Mr. Young: I will give the statement upon that condition. I will let it all be read to the jury, so that they can get the whole thing.

Mr. Dwight: I made the motion to produce. I want the ruling of the Court.

The Court: The Court will grant the motion to produce.

Mr. Young: I refuse to give the statement subject to being in contempt of Court. I believe the Territory has a right to retain the statement.

Mr. Dwight: If we are going to have any argument, I ask the jury be excused.

The Court: The jury may be excused.

(The jury left the court-room.)

The Court: This is an argument on motion to produce. The Court will set aside its decision pending the argument.

(Testimony of Lou Rodgers.)

Mr. Dwight: The law is simply this: I can ask any witness, for the purpose of impeachment, if they made a statement, an inconsistent statement at some other time.

The Court: You have now made a motion to produce.

Mr. Dwight: Yes, and the evidence discloses that such a statement exists and that statement is in the possession of the Public Prosecutor, and I have a right to compel the production of that document. It can compel it from the adversary at any time. I can call on the government at any time to produce. There is nothing [105] incompatible with the prosecution, unless they are hiding the truth.

Mr. Young: We are not entitled to what Mr. Dwight has in his file any more than he is entitled to what we have in our file. Furthermore, I have offered in good faith to your Honor to give this statement to Mr. Dwight upon condition that he take the whole statement and read it all to the jury. I am not going to have him read portions of it to the jury. If he wants my statement, he can take it all. That is the condition. I submit he has no authorities.

The Court: Have you any authorities on that?

Mr. Dwight: I have the authorities on that.

The Court: I would like to look at those authorities.

Mr. Young: I submit to your Honor's ruling at this time.

The Court: The Court would like to see the authorities on that point.

Mr. Dwight: I will get them now.

The Court: Let us have a short recess pending that.

(A brief recess was taken.)

In Chambers.

Respective counsel being present, and at the request of counsel for the defendant, the following proceedings were had:

(The reporter read as follows:)

"Q. You deny you made a statement to this [106] effect, that "Speed" Warren and you were in my office?

A. If I made it to Captain Hays?

Q. To the police, a statement, they got it in writing? A. I don't remember.

Q. And that as you and Mrs. Warren were leaving my office Mrs. Warren said, "I am going to electrify the house" and I said "Okay by me" and that the was the only conversation took place in my office. Do you remember making that statement to the police?

A. In writing?

Q. In writing, and you signed it. Don't you remember it?

A. I remember it.")

(Testimony of Lou Rodgers.)

In Court.

Mr. Dwight: May it please the Court, in view of the fact that the record shows that this witness, in answer to my question if she made the statement to Captain Hays to the effect that when Mrs. Warren and her were leaving my office and going out into the hall Mrs. Warren turned around and said, "I am going to electrify the house" and I said "Okay", answered that was the only statement made to the police, so I withdraw my request for the written statement.

Mr. Young: Is that true?

Mr. Dwight: We read the record. In view of the record, it is not inconsistent any more. [107]

The Court: The Court withdraws its ruling on the motion. Proceed.

By Mr. Dwight:

Q. Now, Miss Rodgers, can you explain why you made one statement to the police and another in court here today concerning that conversation?

A. Well, I only answered the questions what the officer, which if I am not mistaken was—Quinn was one—to my knowledge of what I stated yesterday and today. I tried to do the same of what I had written out.

Q. Your memory in June was much fresher than it was yesterday?

A. It was quite some time from June to now.

(Testimony of Lou Rodgers.)

Q. Have you talked to anybody in the Police Department or in the Public Prosecutor's Office between the time that you made your statement and the time that you testified here in Court?

A. I went to Mr. Young's office.

Q. Who else did you talk to?

A. That is all.

Q. Did you talk to anybody in the Police Department? A. No.

Q. Never talked to anybody. Do you recall visiting Mrs. Warren about a week ago?

A. I do.

Q. That is the first time you visited her since this incident, isn't that correct? A. No.

Q. Is that right? [108] A. No.

Q. You visited her since this death of Wah Choon Lee? A. Yes.

Q. At another time? A. Yes.

Q. When was that?

A. Right after she got out of jail.

Q. Right after she got out of jail and then you visited her again the second time last week?

A. Yes.

Q. You recall having a conversation with her?

A. Well, not that I remember of. The first time I visited her was about this, then she came down to the house last week; it was Friday.

Q. Came up what?

A. She came down to my house last Friday, that is, parked the car in front.

(Testimony of Lou Rodgers.)

Q. Last Friday. She asked you some questions and you answered them, isn't that correct?

A. Yes.

Q. Do you recall Mrs. Warren asking you if you said that you had a conversation in my office?

A. What is that?

Q. At which you were present, when electrical equipment was discussed?

A. She didn't state anything of that.

Q. She didn't state anything about that?

A. Not in my presence last week.

Q. I mean last Friday. What did she ask you? She asked you two questions. [109]

A. I don't know what it was now.

Q. You don't remember. Well, let me refresh your memory. You remember Mrs. Warren asking you what do you mean by lying about bringing Charlie Dwight into the picture?

A. I don't remember saying it.

Q. You remember your answer, "I do and I do not"?

A. I don't remember saying that.

Q. My name was not brought into the conversation on Friday? A. I don't remember.

Q. And where did this conversation take place, at Mrs. Warren's home or at your home, last Friday?

A. She drove down in front of the house.

Q. And the conversation took place in front of her house? A. In front of my house.

(Testimony of Lou Rodgers.)

Q. All right. On the first visit that you made up to Mrs. Warren's house, you went up to Mrs. Warren's house that time after the accident?

A. Yes, she met me on the street one day right after New Year's. She asked me to come up after she got moved in her new home.

Q. You went up? A. Yes.

Q. That was after New Year's this year?

A. Yes.

Q. You remember the date?

A. No, I don't.

Q. You remember any conversation that took place? [110]

A. She wished me a Happy New Year.

Q. That is all she did?

A. Well, conversation went on; it is not interesting.

Q. I see. You have posted "No Trespassing" signs? You have seen "No Trespassing" signs, haven't you, Miss Rodgers?

A. I have seen what?

Q. "No Trespassing" signs.

A. I haven't.

Q. What is that? A. I haven't.

Q. You know where the driveway is going in?

A. What driveway?

Q. Going into the yard. A. Which one?

Q. From the front side. A. Which place?

Q. Mrs. Warren's home, or, rather, her home when you lived with her.

(Testimony of Lou Rodgers.)

A. No, I didn't.

Q. Didn't notice any "No Trespassing" signs?

A. No.

Q. Didn't see any put up anywhere?

A. No.

Q. Didn't see any in the back of the lot?

A. No.

Q. Didn't see any in the front of the lot?

A. No.

Q. Did you look for any? A. No. [111]

Q. Now, this entire statement, Miss Rodgers, that you made to the police was based upon certain equipment that was in your presence and they were questioning you about it, isn't that correct?

A. Yes.

Mr. Dwight: Your witness.

Redirect Examination

By Mr. Young:

Q. Miss Rodgers, when the police had you at the police station shortly after the death of Wah Choon Lee you say they had some electrical equipment in there? A. They did.

Q. And did they ask you if that equipment was the same as was in there when you were there?

A. They asked me, yes.

Q. And that was how they got the lead?

A. Yes.

(Testimony of Lou Rodgers.)

Q. And then they questioned you about what you knew personally about that equipment?

A. They did.

Q. How you knew it was in the house and how it was put in there and all such things?

A. They did.

Q. And everything you told the police was based upon your memory and your own observation and not upon what you saw in the police station?

A. Yes, sir.

Q. Now, there has been some testimony, Miss Rodgers—I don't know whether you withdrew your privilege—you testified you are a prostitute out there? [112]

A. Well, by force, yes.

Mr. Dwight: What is the privilege? I submit she has no right to claim her privilege. She has to answer.

Mr. Young: I will withdraw the question.

Q. Now, Miss Rodgers, June 1st or 2nd, 1936, when you were present at that place, when the police came, what were you doing for Mrs. Warren?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial and as improper redirect examination.

Mr. Young: Your Honor allowed me, your Honor said I could go into it on redirect examination. I think this witness has a right to show what the whole thing was.

(Testimony of Lou Rodgers.)

Mr. Dwight: I submit it is improper redirect examination.

The Court: The Court sustains the objection as improper redirect examination.

By Mr. Young:

Q. Miss Rodgers, do you know what type of business, from your own personal knowledge, Mrs. Warren was having at her house on June 1, 1936?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, as attempting to directly bring into the case the character and reputation of the defendant and that is not an issue in this case.

Mr. Young: If your Honor please, is the Territory supposed to let all this go in on cross-examination and not be allowed to bring it out? [113] You are making Mrs. Warren the white lily and this will be——

The Court: The Court will overrule the objection on the ground stated; the grounds of the objection will be overruled.

Mr. Dwight: May it please the Court, may I be permitted to argue that a little further?

The Court: You may state your grounds.

Mr. Dwight: My grounds are these, that it is incompetent, irrelevant and immaterial, as tending directly to bring into the record the character of the defendant.

The Court: Is that your grounds?

Mr. Dwight: That is my grounds, absolutely.

The Court: Objection will be overruled.

(Testimony of Lou Rodgers.)

Mr. Dwight: Does the Court want the universal rule on that?

The Court: The Court knows that.

Mr. Young: Will you read the question, Mr. Reporter?

(The last question was read.)

A. House of ill fame.

By Mr. Young:

Q. By that you mean——

Mr. Dwight: May I move to strike the answer upon the same ground?

The Court: You may so move. Motion denied.

Mr. Dwight: Exception.

The Court: Exception noted.

By Mr. Young:

Q. And these other girls that were there at that time, [114] were they working for her?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, what the girls have to do with it.

The Court: Objection overruled.

Mr. Dwight: Exception.

Mr. Young: Read the question, please.

(The last question was read.)

By Mr. Young:

Q. You understand the question? A. Yes.

Q. Will you please answer?

A. House of ill fame.

(Testimony of Lou Rodgers.)

Q. The question was, do you know what the other girls were doing? A. The same thing.

Q. Now, did Mrs. Warren ever tell you the reason she went to Mr. Dwight's office?

Mr. Dwight: Objected to as improper redirect examination. He certainly should have exhausted this witness on direct.

Mr. Young: I submit the question.

Mr. Dwight: It has already been asked and answered.

The Court: The objection will be sustained. It has already been taken up on direct examination.

Mr. Dwight: You can only redirect on new matter on cross.

Mr. Young: Withdraw it.

Q. Now, you testified, Miss Rodgers, as to certain [115] interviews, times and dates with respect to going to Mr. Dwight's office. Are those exact dates or close estimates of the time?

A. Close estimates of the time.

Q. To your best recollection? A. Yes.

Q. You testified, I think on cross-examination, that you never heard Mrs. Warren speak to Mr. Kiehm about the equipment. Did Mrs. Warren ever tell you what she had told Kiehm?

A. Well, she said something about it to me first but I don't remember going down to Kiehm's office or the garage to talk about it.

Q. Did she tell you?

A. She did, when she came home.

(Testimony of Lou Rodgers.)

Q. What did she say?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial and improper redirect examination.

The Court: Objection overruled.

Mr. Dwight: Exception.

The Court: Exception noted.

By Mr. Young:

Q. What did she tell you she told Kiehm?

A. She said she was down there and told Kiehm about fixing the wires and fixing the doors.

Q. That was sometime after the raid of June 1st, is that correct? A. Yes.

Q. Sometime before you went to Mr. Dwight's office, [116] is that correct? A. Yes.

Q. Before you moved from Mrs. Warren's place? A. Yes.

Q. As to the exact date, you are not sure?

A. No.

Q. That is the sequence in the events?

A. Yes.

Q. Now, you say you tested this equipment once after it was put in, is that correct? A. Yes.

Q. How did you test it? What did you do?

A. Well, the switch was turned on and I touched my hand on the door.

Q. On what part of the door?

A. On the metal part of the door, outside.

Q. On the outside of the door? A. Yes.

(Testimony of Lou Rodgers.)

Q. You were dry at that time? A. Yes.

Q. The ground was dry? A. Yes.

Q. Were you standing in the house at the time?

A. The door was open and I walked outside, the switch was thrown and I touched the door. Of course, the door had gone to.

Q. Was that before or after Mr. Kiehm fixed the transformer?

A. Well, that was before he fixed it.

Q. In other words, you never touched it after he [117] fixed the transformer? A. Yes.

Q. The only time was before he fixed it?

A. Yes.

Q. And you did get a shock? A. Yes.

Q. Just illustrate how you touched that door with your hand.

A. Just touched it up on top (demonstrating).

Q. With your hand like that, on your finger?

A. Yes.

Mr. Young: No further questions.

Recross Examination

By Mr. Dwight:

Q. Just one more question I overlooked on cross-examination. Miss Rodgers, did you tell the police at the time you were questioned by them that it was Mr. Kiehm who put the equipment in?

A. I don't remember if I did.

Q. You don't remember?

A. Speaking or writing?

(Testimony of Lou Rodgers.)

Q. Speaking or writing.

A. I don't remember because I came out of the show—one evening going to the show, an officer asked me if I knew. I said I didn't. He asked me if it was Kiehm. I said it was the garage man. At that time I did not know his last name; all I knew him by was John.

Q. In other words, they asked you who put that electrical equipment in; you said it was John?

A. I said it was the garage man. [118]

Q. Then you said it was John? A. Yes.

Q. Do you recall everything you told the police down there or not?

A. I don't recall what I told them. I do not remember all they asked me.

Q. In other words, you don't remember your whole, complete statement? A. No.

Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it now affirmatively appears that the evidence the government is now offering by virtue of placing this witness on the stand was obtained as the result of an illegal search and that this evidence tends to incriminate this defendant and violates her rights under the Fourth and Fifth Amendments to the Constitution. I am ready to argue the motion.

Mr. Young: Now, we object strenuously to the motion. It shows from the record the witness has testified from her memory as to what she saw. It doesn't make her testimony unlawful in this case.

She is giving everything from her own memory. I submit the motion should be denied.

Mr. Dwight: I am ready to argue the case. I ask the jury be excused.

The Court: You desire to argue it?

Mr. Dwight: I desire to argue it. It will only be a five-minute or ten-minute argument. [119]

The Court: The jury will be excused pending this argument. Mr. Dwight says it will be about five minutes. It will probably be a little longer. You are excused for at least ten minutes.

(The jury left the court-room.)

(Mr. Dwight argued in support of his motion to strike, citing 251 U. S. 385, Silverthorne Lumber Co. vs. United States.)

Mr. Young: I will just say a few words. I am perfectly in agreement with the law cited by counsel, if it were applicable, but it is not. This is a case of homicide. We are going to prove it was electrocution by the people on the outside. (Argument.) I submit the motion to your Honor.

The Court: The Court is ready to rule. This evidence, which Mr. Dwight asked to be stricken and excluded upon the ground that it is an invasion of the defendant's constitutional rights under the Fourth and Fifth Amendments, in that, as he argues, the evidence is based upon the evidence seized and the illegal search and seizure, is denied. The Supreme Court of the United States has stated in the Silverthorne case that evidence, although

seized in violation of the Fourth and Fifth Amendments and ordered suppressed, still that evidence is not sacred nor inaccessible. The testimony of this witness shows throughout her direct and cross-examination the evidence is based upon her memory at the time [120] she lived in that house, saw the equipment being installed and had an opportunity to see it, test it and describe it. Although she did make the statement in answer to Mr. Dwight that the entire statement made to the police was based on the equipment there in her presence, she also made the statement on redirect, in answer to Mr. Young, that her testimony here in this Court was based upon her memory at the time she lived there. Certainly the Court, under the authority in the Silverthorne case, denies the motion.

Mr. Dwight: May I save an exception?

The Court: Exception may be noted. Mr. Young, have you any witnesses?

Mr. Dwight: I think the Court might rule on my motion, so that I may save my exception, in the presence of the jury.

Mr. Young: That is the proper procedure.

The Court: Call the jury.

(The jury returned to the court-room and jury box.)

The Court: Stipulate the jury is present. Mr. Clark, Reporter, will you read the Court's ruling on Mr. Dwight's motion?

(The reporter read as follows:)

"The Court: The Court is ready to rule. This evidence, which Mr. Dwight asked to be stricken and excluded upon the ground that it is an invasion of the defendant's constitutional rights under the Fourth and Fifth Amendments, in [121] that, as he argues, the evidence is based upon the evidence seized and the illegal search and seizure, is denied. The Supreme Court of the United States has stated in the Silverthorne case that evidence, although seized in violation of the Fourth and Fifth Amendments and ordered suppressed, still that evidence is not sacred nor inaccessible. The testimony of this witness shows throughout her direct and cross-examination the evidence is based upon her memory at the time she lived in that house, saw the equipment being installed and had an opportunity to see it, test it and describe it. Although she did make the statement in answer to Mr. Dwight that the entire statement made to the police was based on the equipment there in her presence, she also made the statement on redirect, in answer to Mr. Young, that her testimony here in this Court was based upon her memory at the time she lived there. Certainly the Court, under the authority in the Silverthorne case, denies the motion."

Mr. Dwight: May I save an exception?

The Court: You may.

Mr. Dwight: May I object to the testimony of this witness upon the same grounds?

The Court: You may.

Mr. Dwight: May my objection and exception run through this entire testimony?

The Court: The objection is overruled and the exception is noted. [122]

Mr. Dwight: May I save an exception to the overruling of my motion to strike?

The Court: Yes, and the record may so show.

JOHN KIEHM,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name? A. John Kiehm.

Mr. Young: Mr. Kiehm, speak a little louder and face the jury.

Q. Where do you live? A. At Wahiawa.

Q. How do you spell your name?

A. K-i-e-h-m, Kiehm.

Q. And it is pronounced "Keem"?

A. Yes.

Q. Like "Keem"? A. Yes.

Q. What is your occupation?

A. Mechanic, auto mechanic.

(Testimony of John Kiehm.)

Q. How long have you been an automobile mechanic? A. Ever since 1924.

Q. Where have you been working at that trade?

A. I have been working here on the Island of Oahu and over at Lanai.

Q. More particularly on the Island of Oahu, at what place? [123] A. At Wahiawa.

Q. And who did you work for at Wahiawa?

A. I worked for Castner Garage and I left there in 1929 or 1930, then I had my own business for about a couple of years. Then the business was formed into a corporation and later it was dissolved, then I worked——

Q. We won't go into the organization of that company. Who were you wroking for in 1936 about between the months of, say, June and September?

A. I was working for Driveway Garage.

Q. You were working for Driveway Garage?

A. Yes, Wahiawa.

Q. Do you know a person by the name of Ilene Warren, "Speed" Warren? A. Yes.

Q. Will you indicate?

A. There (indicating the defendant).

The Court: Let the record so show.

By Mr. Young:

Q. Do you know where she was living?

A. She was living in Wahiawa.

Q. At what place in Wahiawa?

(Testimony of John Kiehm.)

A. It was two blocks above the court house—one block above the court house and two blocks beyond.

Q. Would you know that house if you saw a picture of it? A. I think I do.

Mr. Young: (To the Clerk) May I see the pictures?

The Court: "D", "E", "F" and "G". [124]

By Mr. Young:

Q. Mr. Kiehm, I show you Prosecution's Exhibit "G" in evidence. Will you examine that, please?

(Mr. Young handed the picture to the witness.)

A. Yes, sir.

Q. Is that a picture of "Speed" Warren's house? A. (Examining the picture) Yes, it is.

Q. And also I show you Prosecution's Exhibits "D", "E" and "F" in evidence.

(Mr. Young handed the pictures to the witness.)

Mr. Dwight: Are those in evidence?

Mr. Young: Yes, they are in evidence.

A. (Examining the pictures) Yes, that is her house.

Q. Is that a picture of "Speed" Warren's house as you knew it? A. Yes.

Q. At the time, in 1936? A. Yes.

Q. Between the months of June and September? A. Yes.

Mr. Young: Now, if you will step down to this plat just a moment, Mr. Kiehm. May this Ex-

(Testimony of John Kiehm.)

hibit "I" be introduced in evidence at this time to illustrate the testimony of Lou Rodgers? It was marked for identification. I offer it in evidence.

Mr. Dwight: I object to it as incompetent, irrelevant and immaterial, no proper foundation being shown for its admission; that it is not a fair representation of the witness' testimony. [125]

The Court: That is for the jury to decide. It may be admitted as Exhibit "I".

(The diagram referred to, having previously been marked "Prosecution's Exhibit I for identification," was received in evidence and marked "Prosecution's Exhibit I.")

By Mr. Young:

Q. Now, I am going to explain this briefly to you, Prosecution's Exhibit "A" in evidence, as you can see from the writing. This is Muliwai Street (indicating); Kuahiwi Avenue (indicating); this is the railroad down here (indicating). Do you believe you can point out approximately the place where "Speed" Warren lived with reference to this diagram?

Mr. Dwight: Well, it is on the map with her name on it.

Mr. Young: He does not know her name. If you want him to point to it.

A. (Indicating on Exhibit "A") here.

By Mr. Young:

Q. This is the place here (indicating). That is the location with regard to Muliwai Avenue (indicating).

(Testimony of John Kiehm.)

A. The house faces the front of the street; I am not sure.

Q. Is it on the street that goes past the court house? A. One street above.

Q. That is the house portrayed in these pictures that you have seen? A. Yes.

Mr. Young: May the record show the identification on this plan of the lot marked "Marvin Connell", being the same as portrayed in the pictures? [126]

The Court: Let the record show that.

By Mr. Young:

Q. How long have you known "Speed" Warren?

A. I have known her since 1930, 1929 or 1930.

Q. 1929 or 1930? A. Yes.

Q. While you were working for the Driveway Garage, did you ever do any work for her?

A. I did.

Q. Will you please tell the jury just what the nature of that work was and when you did it?

Mr. Dwight: Let us get the time first.

By Mr. Young:

Q. When did you do this work for her?

A. I have done a lot of work for Mrs. Warren on her car, but pertaining to what work?

Q. Did you ever do any work on her house of any kind whatsoever? A. I have, once.

Q. When did you do that?

(Testimony of John Kiehm.)

A. Sometime in July, 1936.

Q. July 1936? A. Yes.

Q. Are you sure? Do you know the date, the number? A. Yes, it was July 11th.

Q. July 11th? A. July 11th. [127]

Q. Why are you so sure of that date?

A. Because I had the receipt; I had the bill for the job done.

Q. What is the date on the bill?

A. July 11th.

Q. Did she charge that or did she pay you that right after you did the work?

A. It was charged and she paid it on the 14th.

Q. The work was done on the 11th. Now, will you tell the jury just what you did on this house portrayed by the pictures? Tell what your conversation was with Mrs. Warren.

A. Mrs. Ilene Warren came over the garage and asked me if I could install some device, which I could install in the house so the doors would be shocked when the door is opened. I said, "Yes, it could be done." Later on I purchased a transformer from the Service Motors and went over the house and had the transformer installed, and there was one wire leading to the front and one to the back. The main wire was leading to a switch on the door panel.

Q. Did you put the switch in?

A. I don't recall.

(Testimony of John Kiehm.)

Q. But you did connect the wires to the switch?

A. Yes.

Q. Did you? A. Yes.

Q. Where? What wire did you connect to the switch? Where did that wire come from? Where was it connected, the source? [128]

A. The wire came from the fuse plug.

Q. Was that the fuse plug that comes from the ordinary lines? A. Yes.

Q. Leading from the poles outside?

A. No, the fuse plug was in there already.

Q. Was that the regular source of electricity in the house?

A. Not on the regular outside fuse plug; it was an inside fuse plug.

Q. I mean that was being fed by the pole outside. She did not have any electric plant in the house? A. That came from the outside pole.

Q. You ran the wires from the switch to the transformer? A. Yes.

Q. Where was the transformer located?

A. Located above the living-room door.

Q. Did you put that transformer in?

A. I did.

Q. What kind of a transformer?

A. Radio transformer.

Q. What kind of a radio transformer?

A. It may have been Philco or Majestic.

Q. Do you know whether or not, of your own knowledge, it was a radio transformer?

(Testimony of John Kiehm.)

A. I was told it was a radio transformer.

Mr. Dwight: I move it be stricken.

Mr. Young: It may be stricken.

The Court: It will be stricken as to what [129] he was told. The jury will disregard it.

Q. Where did the wires lead from the transformer?

A. One led to the front door, one to the back door, one to the ground.

Q. When you say "to the ground", what do you mean?

A. By putting a pipe into the ground and having a wire lead up the pipe.

Q. Where was the "ground" located with reference to the house?

A. On the side leading up to the kitchen stairs.

Q. That is the side on the front of the house?

A. On the front of the house (indicating on picture).

Q. Hold it towards the jury (referring to picture). Out there (indicating). One of those pictures shows where the ground was?

A. It doesn't show in the picture. The ground was somewhere along here (indicating on picture).

Mr. Young: That is referring to Prosecution's Exhibit "G" in evidence.

Mr. Dwight: Mark the spot where it was.

Mr. Young: May I put an "X" there, Mr. Dwight, on the spot?

Mr. Dwight: Yes.

(Mr. Young puts an "X" on Exhibit "G".)

(Testimony of John Kiehm.)

By the Court:

Q. I will ask the witness is that "X" put correctly? A. Yes.

By Mr. Young:

Q. Is that "X" where it should be?

A. Somewheres around here (indicating on Exhibit "G".) [130]

Q. You got the "X" in the right place?

A. Yes.

Q. And that is where the ground was connected?

A. Yes.

Q. Now, did you do all this wiring yourself?

A. Yes, I did.

Q. Was there anyone else helping you, to your knowledge or recollection?

A. I may have had a helper.

Q. You are not sure of that?

A. I am not positive.

Q. Now, do you know this lady that identified you, Lou Rodgers? A. Yes.

Q. Do you know her? A. I do.

Q. Did you at any time see her at that house while you were putting that equipment in, that you recall?

A. She may have been there and she may not; I don't know.

Q. You could not say one way or the other?

A. I am not positive.

(Testimony of John Kiehm.)

Q. Do you know of your own knowledge whether or not she was staying at that house at that time? A. I think she was.

Mr. Dwight: I am going to move the answer be stricken. If he has any definite information, he could testify about it.

By Mr. Young:

Q. Do you know of your own knowledge or are you just [131] guessing?

A. She was staying there on and off. She may have been living there at the time, she may not; I don't know. I am not sure.

Q. You are not sure? A. I am not sure.

Q. Now, did you tell "Speed" how to operate this?

Mr. Dwight: I object to it as leading.

Mr. Young: Withdraw the question.

Q. Did you have any conversation with "Speed" Warren as to this equipment after you put it in the house? A. I did.

Q. What was the nature of that conversation?

A. It was concerning the wiring and as to how to operate it.

Q. What was the conversation?

A. She asked me, "By throwing the switch on, will the electrical charge go in the door". I said "Yes."

Q. And are you an electrician by trade?

A. I am an auto electrician.

(Testimony of John Kiehm.)

Q. You are an auto electrician? A. Yes.

Q. Have you ever wired a house before?

A. No.

Q. Have you ever studied electricity?

A. I did.

Q. What kind of study?

A. Home course, Wick's Electrical Course.

Q. This was the first time you attempted to wire a house? [132] A. Yes.

Q. Have you ever connected a transformer of any kind to any building before? A. No.

Q. I understand most of your electrical work is in connection with automobiles?

A. Automobiles, yes.

Q. Goes along with that position as mechanic?

A. Yes.

Q. Do you know of your own knowledge what this transformer would do to this current?

A. My own knowledge, I knew that thing would give a shock to a person.

Q. Do you know what it would do with relation to the strength of the current?

A. I was told it would produce about 650 volts.

Mr. Dwight: Never mind what you were told. Move to strike that answer.

The Court: It may be stricken and the jury instructed to disregard it.

Mr. Young: Just tell what you know of your own knowledge.

(Testimony of John Kiehm.)

Q. Do you know of your own knowledge what that transformer would do to the electric current going through it? A. No.

Q. You did not have any way of knowing it?

A. No, no way.

Q. When you connected it up the way you did, you did not know what the effect would be?

A. I knew it would give a shock. [133]

Q. You did not know how strong the shock would be or what the current would be that was passing through it? A. No.

Q. Now, after that was once installed, did you ever go back there and do anything else?

A. On the same wiring?

Q. Same place. A. No.

Q. Did you do anything—Withdraw that question. How many times were you to the Warren place in regard to this particular shocking device?

A. One time.

Q. Did you go to fix it, anything like that, after it was once put in? A. I don't recall.

Q. You don't know whether you did or not?

A. I don't know.

Q. Were you ever requested by "Speed" Warren to come up and fix it?

Mr. Dwight: Objected to as leading.

Mr. Young: I have exhausted the witness.

The Court: Objection overruled.

Mr. Dwight: Exception.

The Court: Exception noted.

(Testimony of John Kiehm.)

By Mr. Young:

Q. Did she ever request you to come up and fix it or do anything to it after you once put it in?

A. I don't think she did.

Q. Are you positive? A. I am not. [134]

Q. She may and she may not have?

A. I can't recall.

Q. You can't recall? A. I can't recall.

Q. Did you get any of the other equipment that you put in that house?

A. I got the wires at the garage.

Q. You got the wires at the garage? A. Yes.

Q. When you connected the wires to the door, what did the door look like? Can you describe it from memory?

A. It was a screen door and had a plate in front.

Q. What kind of a plate?

A. I am not positive what it was.

Q. How big was the plate, how large?

A. I would say about one-third the size of the ordinary screen door.

Q. About one-third the size of the ordinary screen door?

A. About one-third the size of the ordinary screen door.

Q. That was on the front of the door?

A. That was on the front of the door.

Q. How did you attach the wire to the door?

A. That was soldered onto the screen.

(Testimony of John Kiehm.)

Q. That made contact with the plate?

A. It did.

Q. Did you have anything to do with the purchasing of that plate? A. No.

Q. Was that on the door when you came there? [135]

A. I remember seeing a plate on the door.

Q. You can't remember whether you put it on or not?

A. I can say there was a plate on the door; that plate, I didn't put on.

Q. In other words, you didn't put the plate on that was there when you came there? A. No.

Mr. Young: Pardon me just a moment, your Honor.

By the Court:

Q. May I ask a question? What material is that plate made out of?

A. I don't know whether it was galvanized or copper sheet.

Q. Galvanized what?

A. Galvanized iron or copper sheet.

By Mr. Young:

Q. Mr. Kiehm, are you acquainted with—Withdraw that question. How many times have you been in "Speed" Warren's place?

A. I have been there a number of times doing repairs to her stove.

Q. You repaired her stove once?

(Testimony of John Kiehm.)

A. Yes, several times.

Q. You remember the plan, the location, through being in there?

A. I know just the bottom floor, not all.

Q. What part of the bottom floor are you acquainted with? A. Just the living-room. [136]

Q. How about the front door?

A. And the front door.

Q. Do you remember whether or not there was any stairs on the bottom floor?

A. Two stairs, one leading upstairs and one to the kitchen.

Q. Where was the bottom of this stairs with reference to the entrance of the house?

A. As you enter, the stairs to the kitchen lead straight ahead.

Q. Approximately how far was it from the door as you entered the front door and stopped at the door sill, approximately how far was it to the first steps going up on the right?

A. Just about a step.

Q. Just about a step. Can you give us some idea by indicating some object in front of you?

A. Over there to about here (indicating).

Q. Where?

A. Say about here to here (indicating).

Mr. Dwight: About 2½ feet.

Mr. Young: About 2½ feet.

The Court: It is stipulated 2½ feet is indicated.

(Testimony of John Kiehm.)

By Mr. Young:

Q. Now, that is where the first steps started on the stairs going upstairs? A. To the parlor.

Q. That is the parlor upstairs you are talking about, two parlors? [137]

A. Two parlors, downstairs and upstairs.

Q. Now, when you say "parlor", you are talking about the one upstairs?

A. The one upstairs.

Q. With reference to that entrance, can you tell us where this switch was that you connected these wires to?

A. The switch was right on the door post that leads up to the parlor.

Q. On the door post? A. Yes.

Q. What door post?

A. As you enter the house and going upstairs.

Mr. Young: I think we better have a diagram of that. It is five minutes to twelve. It will take a little while. I suggest we continue the case.

Mr. Dwight: I have no objection, if it is for the convenience of counsel. I have no objection to taking an adjournment at this time.

The Court: We will adjourn until nine o'clock Monday morning.

Mr. Young: May we, before the jury is dismissed, summon the witnesses to return Monday morning?

Mr. Dwight: While we are on that, I have been looking at the record to find out if certain sub-

(Testimony of John Kiehm.)

poenas have been served. They don't seem to appear.

Mr. Young: (Naming witnesses standing in the court-room) Lucy McGuire, Florence Billie Penland, Edward Burns, Sergeant Wm. Odle, Sergeant Charles W. Erpelding. Will your Honor please instruct these [138] witnesses to return Monday morning at nine o'clock?

The Court: All you witnesses will report Monday morning at nine o'clock without further order by the Court.

Gentlemen of the Jury, you are under the same instructions I gave you the last time not to discuss this case with any outsider whatsoever. If anyone attempts to approach you in an improper way, report it to the Court.

Mr. Young: I believe we better include the present witness on the stand.

The Court: Mr. Kiehm, you are also included in the order. Court will adjourn until Monday morning at nine o'clock.

(A recess was taken until Monday, February 7, 1938, at nine o'clock a. m.) [139]

Honolulu, T. H., Feb. 7, 1938.

(The trial was resumed at 9 o'clock a. m.)

The Clerk: Criminal 14332 Territory of Hawaii vs. Ilene Warren alias "Speed" Warren, for further trial.

Mr. Young: Ready for the Territory.

Mr. Dwight: Ready for the defendant.

Mr. Young: Stipulate the jury and the defendant are present.

The Court: Let the record so show. Proceed with the trial.

JOHN KIEHM,

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Young:

Q. Mr. Kiehm, will you please stand right there? (Indicating position by the blackboard.)

The Court: Mr. Kiehm is under oath. Continue with the direction examination.

By Mr. Young:

Q. Using this ruler, will you please draw from your memory the floor plan of the house, as you know it, what part of that house you know from your memory, that is, the house of "Speed" Warren that you have testified to?

(Mr. Young handed the witness a ruler and pencil. The witness draws on a sheet of paper tacked to the blackboard.)

Q. Using the top of the board, Mr. Kiehm, to the *the* street that the front door faces, that is, the front door faces that way, Muliwai Street will be on [140] the top of the board.

(Testimony of John Kiehm.)

A. (Drawing further) That is the plan of the house I do know as Speed Warren's house.

Q. Will you step over on this side now, Mr. Kiehm. Where is the front door located in that house? Will you draw that?

Mr. Dwight: May the record show I object to this line of testimony upon the same grounds stated in my objection to the testimony of the other witness?

The Court: The record may so show.

By Mr. Young:

Q. Have you an "F" there? A. Yes.

Q. Will you put a line indicating where the door is? A. (Drawing).

Q. Now, which side is Muliwai Street?

A. Muliwai Street (writing).

Q. You want to refer to this diagram?

A. Muliwai is here (indicating).

Q. Is that Muliwai up here (indicating)?

A. Yes.

Q. Now, as you enter the front door, where was the stairs with reference to this diagram?

A. As you go in, this is the stairs leading to the parlor (indicating).

Q. Leading upstairs? A. Upstairs.

Q. And are these on your right or on your left as you come in the door? [141]

A. Going up on the right.

(Testimony of John Kiehm.)

Q. That is the way you have it here (referring to diagram); as you come in this way, which way would that stairs be?

A. (The witness draws.) On this side.

Mr. Dwight: Q. In other words, to save time, Muliwai Street is on this side (indicating)?

A. Yes.

By Mr. Young:

Q. Muliwai Street is on this side, going this way (indicating)? A. The stairs going up.

Q. You want to change the position of that "F" then? A. Yes.

Q. Now, as you come in the front door, you say that the stairs going upstairs to the parlor are on the right? A. On the right, yes.

Q. That is these stairs here (indicating)?

A. Yes.

Q. Will you mark that going to the parlor and the other stairs go right straight ahead and go up to the kitchen? A. Yes (marking).

Q. You have been up to that kitchen to fix the stove, I believe you testified? A. Yes.

Q. Now, Mr. Kiehm, I want you to mark on that plan the place where the switch was located.

Mr. Dwight: I object as leading. He certainly is not going to put testimony into this witness' mouth. [142]

The Court: Will you read the last question?

The Reporter: I didn't get the last part of the question.

(Testimony of John Kiehm.)

By Mr. Young:

Q. Mr. Kiehm, will you please place an "X" at the point where this switch was located that you testified about, the place where this switch was located with reference to the stairs?

A. (The witness marks.)

Mr. Young: Let the record show that the witness marks the spot with an "X" at about the third step, the third line.

Q. Those lines indicate the steps in the rough diagram? A. Yes.

Q. I believe you testified Friday that the switch was 2½ to 3 feet from the front door, is that correct? A. Yes.

Q. That would be from point "X" to the front door would represent about three feet?

(The witness did not answer audibly.)

Mr. Young: Mr. Kiehm, please speak louder.

The gentlemen of the jury have to hear you and the Court. Just speak a little louder.

Q. Do I understand, Mr. Kiehm, your testimony is from the front door as you come in the switch is located 2½ to 3 feet from the door on the right-hand side? That is correct? A. Yes.

Q. Approximately how far from the bottom of the steps, [143] going up vertically, is the switch located, to your best recollection?

A. I would say about four feet.

Q. About four feet. Now, will you please tell us what this square represents?

(Testimony of John Kiehm.)

A. That square is the lower parlor.

Q. That square is the lower parlor. Will you tell us where you put this transformer? Will you mark a "T" where you installed the transformer?

A. Above this door (indicating on diagram and marking).

Q. Above what door?

A. Above the door that leads into the parlor.

Q. What else was at that point where you put the transformer? A. There was a fuse plug.

Q. Anything else?

A. Yes, there was a small Bell transformer.

Q. Now, where is the back door in that house located, do you know? Is this the only part of the house that you are familiar with? A. Yes.

Q. You are not familiar with any of the other parts of the house.

A. That door is somewhere around here (indicating).

Q. Now, will you please draw—let me have the crayons—with this red pencil the way that the wires—you testified you hooked the wires up to the front door and the back door. Just trace the wires the way you put them in, just roughly.

A. On this diagram?

Q. Yes, just the course of the wires. [144]

A. One wire led to the transformer.

Q. Just mark that.

A. One at the back and one going to the ground (tracing with pencil). Just about here the two wires

(Testimony of John Kiehm.)

met a switch (indicating) and back again to the transformer.

Q. Now, over on this side of the board, Mr. kiehm, *will just* draw a little larger diagram of how the wires, roughly, were situated, that is, draw the circuit, if you can. Mark the fuse plug, the transformer and the switch. Show how the circuit was connected.

The Court: Use a darker pencil. I believe you will see better.

By Mr. Young:

Q. Use this darker pencil. Thank you, your Honor. A. (The witness draws on paper.)

Q. Now, you have the circuit starting at the fuse plug? A. That is right.

Q. That was connected with the outside line?

Mr. Dwight: Objected to unless he knows definitely.

By Mr. Young:

Q. Do you know from your own knowledge?

A. I knew this was the same line that came in.

Mr. Dwight: I object to the question as incompetent, irrelevant and immaterial.

Mr. Young: I submit to your Honor's ruling.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception noted. [145]

The Court: Will you trace that red in black? It is not visible at all. Trace over your red with black on that diagram.

(Testimony of John Kiehm.)

A. (The witness retraces the red lines in black.)

By Mr. Young:

Q. You have the circuit starting at the fuse here, is that correct (indicating)? A. Yes.

Q. From there you have two wires going to the switch? A. Yes.

Q. What kind of a switch was that?

A. Double-throw knife switch.

Q. Knife switch, double-throw? A. Yes.

Q. You have two wires going to the transformer? A. Yes.

Q. Could you draw approximately the size of that transformer?

Mr. Dwight: May it please the Court, may I renew my objection? The further objection, that this witness is to reproduce evidence by an actual drawing of what this Court has suppressed. I object as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled. There was no showing but what this was entirely independent of any illegal search and seizure.

Mr. Dwight: Exception.

The Court: Exception noted.

By Mr. Young:

Q. From your memory of that transformer that you put [146] in there, will you draw the approximate size of it to life scale?

A. (The witness draws.)

(Testimony of John Kiehm.)

Q. Now, this square or rectangle you have here, what side of the transformer does that represent, looking at it from the large side?

A. Looking straight ahead at the transformer.

Q. What would be the other dimension? Draw it from the other view.

A. (The witness draws on paper.) This is from the side.

Q. From your recollection.

Mr. Dwight: Will the witness mark "side view" and "front view" and "top view"?

The Court: And label what the object is itself.

A. Transformer.

Mr. Dwight: Write it in.

By Mr. Young:

Q. Now, from your recollection of the measurement of that, could you give us the inches wide and long and thick?

A. I should say it is about 4½ inches wide by 6 inches long; about two or three inches thick.

Q. Now, after the wires went to the transformer, you have some lines going out here (indicating). Will you explain what they are, please? Step over here so the jury can see.

The Court: Talk loudly.

A. This line goes to the ground (indicating).

Q. And that is attached to this place that you marked on the diagram the other day outside up over where you put this point "X"? [147]

A. Yes.

(Testimony of John Kiehm.)

The Court: On what exhibit?

Mr. Young: "G", your Honor.

Q. That is a pipe out in front of the house, is that correct?

A. Yes, and one leads to the front, a splice there (indicating), and another line runs to the back.

Q. When you say "front door" you mean the door there on the other diagram? A. Yes.

Q. And this transformer that you testified to was located above the door?

Mr. Dwight: Let the witness locate it, Mr. Young.

By Mr. Young:

Q. You locate it.

A. This transformer was right above the door. This wire leads to this front door and that wire leads to the back door and the ground on the side of the house (indicating on diagram.)

Q. Will you take the stand? Mr. Kiehm, looking at these exhibits or pictures of the house on the board, can you show us by any of those pictures where the front door is located that you testified to on this diagram?

A. This is the front door (indicating on picture.)

Q. Pointing to Exhibit "D" in evidence. That is the front door? A. Yes.

Q. Pointing to that picture, on which side is the stairs going up on the inside? [148]

A. This side going up (indicating).

(Testimony of John Kiehm.)

Q. Indicating the right side of the picture. The stairs that go to the kitchen, where do they go?

A. Right here (indicating).

Q. Now, just how did you attach these wires to the front door, Mr. Kiehm?

Mr. Dwight: Objected to as already having been asked and answered.

The Court: Objection overruled.

Mr. Dwight: Exception.

The Court: Exception noted.

A. The wire was soldered onto the front screen.

By Mr. Young:

Q. How did it approach the screen, from which side of the door?

A. The inside is on the right upper corner.

Q. The right upper corner?

A. That is inside the house.

Q. Looking over into the house? A. Yes.

Q. May I put it this way: Was it on the side where the hinges are on the door?

A. About an inch above the hinge.

Q. About an inch above which hinge?

A. The upper hinge.

Q. That is where the wires cross from the wall to the door?

A. That is where the wires cross from the wall to the door.

Mr. Young: Excuse me just a moment, your Honor. Your witness. [149]

(Testimony of John Kiehm.)

Cross Examination

By Mr. Dwight:

Q. Mr. Kiehm, have you talked to anybody about your statement that you were to give in Court? A. I have, to Mr. Young.

Q. You have, to Mr. Young. When did you talk to Mr. Young?

A. I believe it was two weeks ago.

Q. Two weeks ago? A. Yes.

Q. And you had only one conversation with him? A. I had one at his office.

Q. Only once at his office?

A. At his office, yes.

Q. Did you talk to him at any other time?

A. I did, outside at the hallway.

Q. Did you make any other statement to anybody? A. Not that I know of.

Q. Didn't you make a statement to the police?

Mr. Young: If your Honor please, counsel is laying a foundation for impeachment. I submit the foundation isn't being laid. He must call attention to inconsistent statements.

The Court: It is proper cross-examination, going to his credibility. Objection overruled.

A. Yes, I did, to the police.

By Mr. Dwight:

Q. When did you make a statement to the police?

A. I believe sometime last year; sometime in last year.

(Testimony of John Kiehm.)

Q. In relation to the time that this police officer was killed, was it before or after the police officer was [150] killed? A. It was after.

Q. It was after the police officer was killed?

A. Yes.

Q. Now, Mr. Kiehm, did you sign a statement at the police station when you made this statement?

A. I did.

Q. That was the first statement you made concerning this particular incident?

A. That is right.

Q. And at the time that that statement was made, did they show you certain electrical equipment at the police station? A. Yes.

Q. That consisted of a transformer?

A. Yes.

Q. That consisted of some wires? A. Yes.

Q. And that consisted also of a switch?

A. Yes.

Q. And they were the same articles that you testified here on direct examination that you put into the house? A. Yes.

Q. Now, Mr. Kiehm, what was the conversation that you had with Mrs. Warren concerning this installation?

A. That was in 1936. She drove up the shop with Lou Rodgers and she asked me if I could install some kind of a device in the front door to keep away soldiers.

(Testimony of John Kiehm.)

Q. If you could install a device on her front door to keep away soldiers—Go ahead. [151]

A. Because they come there at all hours of the night, pounding at the door.

Q. Yes.

A. So I told her that a transformer would give a shock. She asked me if I could have it installed.

Q. You told her the installation of a transformer and some wires would give them a shock?

A. Yes.

Q. Did she ask you if you would guarantee that it would not kill or did you tell her that it would not kill?

A. I remember telling her that the shock in the front door wasn't strong enough to harm a person.

Q. You told her that the shock in the front door wasn't strong enough to harm a person?

A. Yes.

Q. And then she asked you to install it, is that correct? A. Yes.

Q. And did you not tell the police in your statement that you made that that equipment could not kill? A. Yes, I did.

Q. And did you tell them that if the equipment were put up, you would prove to them that it could not kill? A. Yes.

Q. And when you first had your conversation with Mrs. Warren, Mr. Kiehm, you told her that you could put in an apparatus that would not harm anybody? A. Yes.

(Testimony of John Kiehm.)

Q. And that was the apparatus that you were referring [152] to, the apparatus that you testified here about? A. That is right.

Mr. Dwight: Your witness, Mr. Young.

Redirect Examination

By Mr. Young:

Q. Mr. Kiehm, everything you have testified to here this morning is from your own memory of what happened?

A. Yes, from my own memory.

Q. And what you put in the house? A. Yes.

Q. And that was not influenced in any way by what the police told you? A. No.

Mr. Young: May I be permitted——

The Court: Are you going to introduce this as an exhibit?

Mr. Young: Yes, your Honor.

Recross Examination

By Mr. Dwight:

Q. (To Mr. Young) Are you through? (No response.)

Mr. Kiehm, you testified on cross-examination that the police showed you this equipment?

A. Yes.

Q. And asked you what you knew about it, isn't that correct? A. Yes.

Q. And then you started to tell them your story; isn't that what happened? [153]

(Testimony of John Kiehm.)

Q. Did they offer any immunity, if you told them your story, that you would not be prosecut*ion* for murder? Did they tell you that if you could tie up Mrs. Warren, that you would not be prosecuted? Did they give you that assurance?

A. All Captain Hays told me was this: "We are trying to get at the truth."

Q. What else?

A. And the exact words he said I have forgotten.

Q. Did he tell you that you wouldn't have to be worried; that you wouldn't be pinched or prosecuted, if you told your story?

A. He said something like if I told the truth, that I would be all right, I think it was.

Q. You would be all right; he gave you that assurance? A. I think he did.

Q. Then you started to tell your story?

A. Yes.

Mr. Dwight: That is all.

Mr. Young: No further questions. May this be received in evidence as Prosecution's Exhibit "J"?

Mr. Dwight: Subject to my general objection, and my further objection that this is a reproduction—I refer to this section of the sketch of the wires, the fuse, the switch, the transformer, the ground, the front view of the transformer, the side view of the transformer, are actual reproductions of evidence that this Court ordered suppressed, or copies. Has the Court ruled on it? [154]

The Court: The objection will be overruled.

Mr. Dwight: May the Court reserve the ruling because I want to submit authorities?

The Court: The Court will enter this as Exhibit "J" in evidence and reserve the ruling for further authorities, which counsel may wish to present at a later time.

Mr. Dwight: At this time I move to strike the testimony of this witness on the ground it is incompetent, irrelevant and immaterial; that it is based upon information procured during an invalid search and that this testimony tends to incriminate the defendant under the Fifth Amendment and was obtained in violation of the defendant's rights under the Fourth Amendment, and also on the further ground that the testimony was procured in violation of law and I would like to argue the matter—I will be very brief—in the absence of the jury.

The Court: What authorities have you?

Mr. Dwight: I have the wire-tapping case where Justice Brandeis goes to the——

The Court: The jury will be excused during this argument and will be called when completed.

(The jury retired from the court-room.)

The Court: I think we better take this up in chambers.

Mr. Dwight: No, I think the proper method would be to have the argument in court. [155]

Mr. Dwight: I only desire to cite three cases. The first one is very brief. Since the Silverthorne

Lumber Company decision the first case I desire to cite is that of Agnello vs. United States. I quote from the Agnello decision and I quote from page 150 U. S. Law Ed., page 148. Apparently I will be reading from your copy of the Supreme Court Decisions around page 23 or 24. I quote this: (Reading)

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

Now, Justice Brandeis in the wire-tapping case goes into the Silverthorne case rather thoroughly and I read what he has to say.

The Court: What citation is that?

Mr. Dwight: Olmstead v. United States, 72 U. S. Law Ed. 944. I begin to read from page 954 of the decision or at page 474 in your Honor's volume of the decision. The Court will remember that the wire-tapping case was a new situation which arose as a result of tapping wires and obtaining information while not on the premises of the defendant. The Court was divided five to four. The majority decision by Chief Justice Taft sustained the admissibility of the evidence upon the ground that the 4th Amendment had not been violated, and that the 4th and 5th Amendments sort of run together, therefore there was no incrimination by the evi-

dence. Justice Brandeis, [156] who made a most thorough study of the question, contended that the evidence was inadmissible because it was unethically as well as illegally obtained and the four justices agreed with Justice Brandeis. Since that time the new wire-tapping case came to the attention of the Court only recently and I have it in the advance sheets. It was decided on the 20th of December, 1937, Nardone vs. United States, 58 Supreme Court Reporter 275. There they held that evidence obtained illegally or unethically was illegal, but I do want to read from page 952.

The Court: In the Olmstead case, page 950?

Mr. Dwight: In the Olmstead case at page 952. Before going on to it, Mr. Justice Holmes said: (Reading)

> "My Brother Brandeis has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it, I am not prepared to say that the penumbra of the 4th and 5th Amendments covers the defendant, although I fully agree that courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them",

and he agrees with Brandeis' decisions, and basing his decision upon the Silverthorne case Justice Brandeis said this, speaking of the 4th and 5th Amendments: (Reading)

> "When the 4th and 5th Amendments were adopted, 'the form that evil had theretofore taken' had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It would secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such [157] invasion of 'the sanctities of a man's home and the privacies of life' was provided in the 4th and 5th Amendments, by specific language."

That is what I am driving at. The information leading to the issuance of a subpoena and leading to the calling of this witness has been unlawfully secured. (Reading from Olmstead v. United States, 72 U. S., Law Ed. 944) And in this particular case, by a witness—I am speaking both of the Rodgers girl and this last witness—Miss Rodgers saw this apparatus in there; Kiehm saw it and put it in. (Reading further from Olmstead v. United States, 72 U. S. Law Ed. 944) That is the basis of my objection. Any such use constitutes a violation of the 5th Amendment. I submit, may it please the Court, under the last ruling, I might say the case goes on and the minority opinion in that case holds that

unethical evidence or evidence illegally obtained could not be used. Then along came the Supreme Court of the United States and they held definitely that evidence obtained illegally cannot be used. That is the last word from the Supreme Court of the United States.

The Court: Will you give the volume?

Mr. Dwight: Volume 6 of the advance sheets at page 250. May it please the Court, in view of the subsequent cases, the Supreme Court has subsequently held this evidence couldn't be used at all, particularly in view of this decision in the Olmstead case. I submit all of this evidence of Miss Rodgers and this last witness is incompetent, [158] irrelevant and immaterial, tending to incriminate this defendant and violated her rights under the 5th Amendment.

Mr. Young: Just briefly. I have nothing further to add except as to what was said in regard to Miss Rodgers and Kiehm. He is testifying on his own information. The police found a man dead out on the sidewalk. I submit there is nothing from this man's testimony that shows anything to connect him with the illegal search. If your Honor will read this last case, it is based upon a Federal statute.

Mr. Dwight: This last decision was based upon a Federal statute and this Court held definitely that evidence obtained illegally and unethically is in violation of law.

The Court: Pass me just that advance sheet.

(Mr. Dwight handed same to the Court.)

Mr. Dwight: That is only on the question of wire-tapping. Chief Justice Taft sustained it. They hadn't been on the premises.

The Court: In the first place, there is no evidence at all to show in what manner Kiehm was secured as a witness.

Mr. Dwight: Yes, there is testimony on cross-examination definitely points that out. On cross-examination I asked him definitely. The Court will recall that Lou Rodgers on her cross-examination was asked by me if the police asked her—— [159]

The Court: I remember.

Mr. Dwight: (Continuing) —who put that apparatus in.

The Court: I am not talking about Kiehm's evidence.

Mr. Dwight: I am speaking of the evidence so far, the answer of Miss Rodgers. She said she wouldn't answer first, then she said a garage man. Kiehm's testimony on cross-examination was that they showed him this apparatus, show him this apparatus and asked him if he put that in "Speed" Warren's house and that was the first thing they did. Then he said yes, then he went to work and described how he put it in. That is the record.

(A brief recess was taken.)

The Court: The Court has emphatically, and I believe clearly ruled that this evidence——

Mr. Young: Does your Honor want to make this ruling in the presence of the jury?

The Court: The Court has already emphatically, and I believe clearly, ruled that this evidence seized in the manner that it was by the police, was improper, illegal and in violation of the constitutional rights of the defendant under the 4th and 5th Amendments thereof and that evidence has been suppressed, but in the Silverthorne case it was stated and held that that evidence is not sacred nor inaccessible. The question resolves itself into whether or not this evidence of witness Kiehm and witness Rodgers was dependent upon this [160] illegal search and seizure. If it was, it would be stricken by the Court and excluded from the record. The Court believes that is the test in the cases cited, as far as the Court has read them in every case. The Court has read the testimony, for instance, in the Flagg case, 233 Federal page 481, where letters were illegally seized, and there was an illegal search and seizure. The Federal attorney studied that evidence for a period of three years and secured secondary evidence from the evidence illegally seized. The Court held, of course, that that secondary evidence was just as much a violation of the constitutional rights as the primary evidence, where an officer will gain information, for instance, in making copies of papers or gain evidence of other apparatus or gain leads from the illegally seized evidence. These cases have all been examples where the evidence sought to be introduced in the trial of the defendant was gained solely from the illegal

evidence and entirely dependent upon that illegal evidence. In the case at bar the Court finds that the evidence of Lou Rodgers was not in any sense of the word dependent upon the seized illegal evidence. She was an inmate of the house, was seen living in the house by the police a year prior to the death of Officer Lee and her evidence was based entirely upon her independent knowledge. Certainly her evidence is not in any sense of the word dependent upon illegal seizure by the police. The mere fact that she was given the opportunity to [161] see and look at the illegally seized evidence does not bring it in within the rule of the authorities cited. Her evidence was primarily based upon her independent knowledge of the equipment which she saw installed. In the course of her examination by the police upon her independent knowledge, it was discovered by the police that witness Kiehm was the man she saw installing the equipment. This source was, in itself, entirely independent of the illegal search and seizure and consequently it is proper for the prosecution to introduce witness Kiehm and is not a violation in any respect of the defendant's constitutional rights. Witness Kiehm also testifies from his independent knowledge, free and clear of the illegal search and seizure. His knowledge of how the electrical equipment looked and how it was put in and installed was based upon his actual experience and personal knowledge thereof. Here again the mere fact that he was shown that equipment,

which had been illegally seized, is not enough to bring his independent personal knowledge of that equipment within the ruling of this Court in respect to the illegally seized evidence, as was definitely stated in the Silverthorne case in 251 U. S. at page 392; (Reading)

> "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed," [162]

which in that case was copies of papers illegally seized. Here the evidence of Rodgers and Kiehm was gained from an independent source and that may, therefore, be proved like any other evidence based in this case upon their personal and independent knowledge and clearly not solely gained by the government's own wrong nor dependent upon that wrong. Consequently, the Court overrules the defendant's motion to strike this evidence.

(The jury returned to the court-room and jury box.)

The Court: Mr. Reporter, Mr. Clark, will you read the Court's decision overruling defendant's motion?

(The reporter read as follows:)

> "The Court: The Court has already emphatically, and I believe clearly, ruled that this

evidence seized in the manner that it was by the police, was improper, illegal and in violation of the constitutional rights of the defendant under the 4th and 5th Amendments thereof and that evidence has been suppressed, but in the Silverthorne case it was stated and held that the evidence is not sacred nor inaccessible. The question resolves itself into whether or not this evidence of witness Kiehm and witness Rodgers was dependent upon this illegal search and seizure. If it was, it would be stricken by the Court and excluded from the record. The Court believes that is the test in the cases cited, as far as the Court has read them in [163] every case. The Court has read the testimony, for instance, in the Flagg case, 233 Federal page 481, where letters were illegally seized, and there was an illegal search and seizure. The Federal attorney studied that evidence for a period of three years and secured secondary evidence from the evidence illegally seized. The Court held, of course, that that secondary evidence was just as much a violation of the constitutional rights as the primary evidence, where an officer will gain information, for instance, in making copies of papers or gain evidence of other apparatus or gain leads from the illegally seized evidence. These cases have all been examples where the evidence sought to be introduced in the trial of the defendant was

gained solely from the illegal evidence and entirely dependent upon that illegal evidence. In the case at bar the Court finds that the evidence of Lou Rodgers was not in any sense of the word dependent upon the seized illegal evidence. She was an inmate of the house, was seen living in the house by the police a year prior to the death of Officer Lee and her evidence was based entirely upon her independent knowledge. Certainly her evidence is not in any sense of the word dependent upon illegal seizure by the police. The mere fact that she was given the opportunity to see and look at the illegally seized evidence does not bring it in within the rule of the authorities cited. Her evidence was primarily [164] based upon her independent knowledge of the equipment which she saw installed. In the course of her examination by the police upon her independent knowledge, it was discovered by the police that witness Kiehm was the man she saw installing the equipment. This source was, in itself, entirely independent of the illegal search and seizure and consequently it is proper for the prosecution to introduce witness Kiehm and is not a violation in any respect of the defendant's constitutional rights. Witness Kiehm also testifies from his independent knowledge, free and clear of the illegal search and seizure. His knowledge of how the electrical equipment looked and how it was put in and installed was

based upon his actual experience and personal knowledge thereof. Here again the mere fact that he was shown that equipment, which had been illegally seized, is not enough to bring his independent personal knowledge of that equipment within the ruling of this Court in respect to the illegally seized evidence, as was definitely stated in the Silverthorne case in 251 U. S. at page 392, (Reading)

> 'Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed,'

which in that case was copies of papers illegally seized. Here the evidence of Rodgers and Kiehm was gained from an independent source and that may, therefore, be proved like any other evidence [165] based in this case upon their personal and independent knowledge and clearly not solely gained by the government's own wrong nor dependent upon that wrong. Consequently, the Court overrules the defendant's motion to strike this evidence."

Mr. Dwight: May I save an exception to the Court's ruling?

The Court: Exception saved and noted.

Mr. Dwight: On the grounds stated, and I renew my objection all the way through, including this witness, your Honor, on the same ground.

The Court: All right. [166]

LUCY McGUIRE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Lucy McGuire.

Mr. Young: Miss McGuire, will you speak up a little louder?

Q. What is your name, please?

A. Lucy McGuire.

Q. Just a little louder. Where do you live, Miss McGuire? A. Waialua.

Q. What place at Waialua?

A. Portuguese Camp.

Q. Just a little louder. Do you know a person by the name of Ilene Warren also known as "Speed" Warren? A. Yes.

Q. Is she here in the court-room?

A. Right there in the white hat (indicating the defendant).

Mr. Young: Let the record show the identification.

The Court: Let the record so show.

(Testimony of Lucy McGuire.)

By Mr. Young:

Q. How long have you known her?

A. About a year now.

Q. How did you become acquainted with her?

A. I was working for her.

Q. When did you work for her? [167]

A. Either in July or August, 1936.

Q. Either in July or August, 1936?

A. Yes.

Q. Just a little louder, please.

A. It was either in July or August 1936.

Q. What did you do for Mrs. Warren at that time?

A. I cooked, cleaned the house and did her laundry.

Q. Who else was living there at that time?

Mr. Dwight: Objected to as incompetent irrelevant and immaterial.

The Court: Objection overruled.

Mr. Dwight: Exception.

The Court: You can answer.

A. Lou Rodgers and two other girls.

By Mr. Young:

Q. Do you know the names of the other girls?

A. No.

Q. Was Mrs. Warren living there then?

A. Yes.

Q. Anyone else? A. No.

Q. Mrs. Warren, yourself, Miss Rodgers and two other girls? A. Yes.

(Testimony of Lucy McGuire.)

Mr. Dwight: Just a moment. She was not living there.

A. Yes, I had my own room.

By Mr. Young:

Q. Where was your room located?

A. Downstairs. [168]

Q. How many bedrooms are there downstairs?

A. Four bedrooms.

Q. You look at these exhibits on the board up there, Miss McGuire, Exhibits "D", "E", "F" and "G" in evidence (indicating), and tell me whether or not you recognize the house there?

A. That is her house there (indicating).

Q. Are you acquainted with the upstairs and the downstairs of that house? A. Yes.

Q. Are you familiar with the rooms?

A. Yes.

Q. Do you know whether or not a stairs leads upstairs from downstairs? A. Yes.

Mr. Dwight: I object to counsel leading the witness, not only by words but by signs.

The Court: Objection will be sustained.

By Mr. Young:

Q. Will you take this ruler? (Handing same to witness.) Will you tell me whether or not there was any stairs leading from the bottom floor of that house to the upstairs?

A. Yes, one going upstairs.

Q. One going upstairs?

(Testimony of Lucy McGuire.)

A. Yes, there is another one going in the Kitchen.

Q. Where does that go to?

A. To the living-room upstairs.

Q. Are there any windows in that room that faces Muliwai Street?

A. Yes, right here (indicating) and two windows to the [169] living-room.

Q. Will you state whether or not there are windows at the top of the stairway?

A. Right here (indicating). You could see outside from that window.

Q. You can look through that window and see who is downstairs at the front door?

A. Yes, sir.

Q. Have you ever done that yourself?

A. Yes.

Q. Have you ever seen "Speed" Warren look out that window? A. Yes, a lot of times.

Q. Now, do you know of your own personal knowledge what that house was used for?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, tending to bring the character of this defendant directly in issue. I submit that tends to bring the character of the defendant in issue. The Court has already ruled it is not admissible.

Mr. Young: On several occasions this same matter has come up. Your Honor knows from the offers of proof what the exact purpose of this evidence is

(Testimony of Lucy McGuire.)
for, not to cast any reflection on the character of this defendant.

Mr. Dwight: I don't care. This Court has to determine what the effect of that testimony is. If it is bringing the character of the defendant into issue, then it is inadmissible. He does not [170] even have to make an opening statement to the jury. This Court has to determine the question of the effect of any evidence. Certainly this Court cannot say that testimony and the testimony of the witnesses the other day does not tend to bring in issue the character of the defendant.

The Court: The Court overrules the objection. The purpose of the testimony is not to bring in issue the character of the defendant. The purpose is as already stated. The Court overrules the objection.

Mr. Dwight: May I have an exception?

The Court: You may have an exception.

Mr. Young: Instruct Mr. Dwight not to disturb me.

Mr. Dwight: I apologize, Mr. Young.

(The last question was read.)

The Court: Answer the question.

Mr. Dwight: Just a moment. I have another ground, calling for the conclusion of this witness. Maybe that is a substantial ground, calling for the conclusion of this witness.

The Court: Have you anything to say on that?

Mr. Young: I submit it, your Honor.

(Testimony of Lucy McGuire.)

The Court: The Court will sustain the objection, calling for a conclusion of the witness. Objection sustained.

By Mr. Young:

Q. Miss McGuire, you testified that some girls lived there? A. Yes. [171]

Q. What type of work, what were the girls doing there?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial. The character of the girls is not before the Court. It is not an issue in this case.

The Court: The Court will overrule the objection.

Mr. Dwight: I save an exception.

The Court: Exception may be noted. This answer will be based upon what you saw and what you know of your own knowledge.

Mr. Dwight: And also again calling for the conclusion of this witness.

By Mr. Young:

Q. Will you tell us what you saw in that house? That is all we want.

A. Well, there were a lot of soldiers coming in to see the girls.

Q. What did the soldiers do, if anything; after they got through what did they do?

A. They went to see a girl; the girls would take them in the room. The girl would come back and give that money; go in the room with soldiers, stay three or four minutes and come out.

(Testimony of Lucy McGuire.)

Q. Would the girls be in the rooms alone with the soldiers? A. Yes.

Q. What did you do with this money? Did they give you the money?

A. Sometimes they gave it to me. [172]

Mr. Dwight: Objected to as leading.

The Court: Objection overruled.

Mr. Dwight: I will save an exception to the Court's ruling.

The Court: Exception may be noted.

Mr. Dwight: Q. Sometimes they gave it to you?

A. Yes, to put away in the box.

By Mr. Young:

Q. Did you ever see them give it to anybody?

A. Sometimes to "Speed" Warren.

Q. What did you do with the money they gave you?

A. We had a box with the girl's name on it.

Q. What did you do with the money when they gave it to you?

A. Put it in the box so that the girls could have it when "Speed" came.

Q. Did you ever give any money to "Speed" Warren?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial and as leading.

The Court: Objection overruled.

A. Sometimes I gave it to her; sometimes I put it in the box. When she wasn't there, I would always tell her.

(Testimony of Lucy McGuire.)

Q. Now, what rooms in the house were used for this purpose that you testified to?

A. Downstairs.

Q. The upper portion of the house, did any girls go up there?

Mr. Dwight: Objected to as leading, incompetent, irrelevant and immaterial. I will waive [173] the oath and will counsel testify, if the Court is going to rule this way. I certainly do object to this testimony, continually putting the questions, the facts into the witness' mouth and calling for an answer "Yes". I submit that is a leading question. Leading questions are incompetent.

The Court: The Court will sustain the objection to the form of the question.

By Mr. Young:

Q. You testified that the rooms on the bottom floor were so used? A. Yes, trick rooms.

Q. Were any other rooms in the house so used?

A. No, not upstairs, just downstairs.

Q. What did you testify they were called?

A. Trick rooms.

Q. Who called them that?

A. "Speed" Warren.

Q. Now, during the time that you lived there, while Lou Rodgers was there, did you ever notice anything unusual about the doors in that house?

A. Not until I, myself, was going to throw the garbage out one night. It was raining; my hands were wet; I touched the door and got a shock.

(Testimony of Lucy McGuire.)

Mr. Dwight: Can I have that answer?

(The last answer was read.)

By Mr. Young:

Q. What door was that, that you touched?

A. The front door. [174]

Q. How did you touch it? Will you illustrate?

A. Well, there is a little knob there. I was just going to hold it and got shocked.

Q. You touched the knob? A. Yes.

Q. Just put one hand on it?

A. Yes, I had to hold the garbage with the other.

Q. Did you have any conversation with "Speed" Warren about that incident?

A. She was upstairs. I told her; she started laughing and told me not to touch the door. She said it was loaded with electricity. She told me about the switch, where it was and everything.

Q. Where was the switch?

A. Right by the side of the door.

Q. Did she point to the switch?

A. She told me if I turned it all the house would be all loaded with electricity.

Q. Did she tell you what that switch was for?

A. She said to scare the soldiers and in case of a raid.

Q. She said to scare the soldiers and in case of a raid? A. Yes.

Q. What else did she say, if anything?

(Testimony of Lucy McGuire.)

A. That is all I know.

Q. Did she ever give you any instructions as to what to do in case of a raid?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial. [175]

The Court: Objection overruled.

Mr. Dwight: Exception.

The Court: Exception noted.

A. Yes, she told me in case of a raid to call her lawyer up and he would know what to do.

Mr. Dwight: You mean after you were pinched.

By Mr. Young:

Q. Now, during the time you lived there, do you recall—I will withdraw that question. May I have just a moment, your Honor? Did "Speed" Warren show you anything else but the switch?

A. Yes.

Q. What else did she show you?

A. Well, I knew where the transformer was.

Q. Where was the transformer?

A. In the door downstairs.

Mr. Dwight: I move to strike that answer as irresponsive to the question.

The Court: Objection overruled.

(The last question and answer were read.)

Mr. Dwight: That is the question and answer I take an exception to.

(Testimony of Lucy McGuire.)

By Mr. Young:

Q. This switch, with reference to the stairway, which stairway and what part of the house was this located?

A. One going upstairs to the living-room.

Q. Would that be on the righthand side, if you are going upstairs to the living-room?

A. It was on your right side.

Q. And what part of the house was it attached to? [176]

Q. Right by the door? A. Yes.

Q. Was it on the door itself?

A. No, not on the door but on the side.

Q. Will you step over to this door by his Honor and illustrate where it was with relation to the door, if your Honor doesn't mind?

A. Coming in here (indicating), it was just inside here.

Q. Where you have indicated.

Mr. Dwight: Indicating a point just even with the knob, indicating about four feet (from the floor).

By Mr. Young:

Q. Now, did anyone else come there besides soldiers, that you know of?

Mr. Dwight: Objected to as leading.

The Court: Sustained.

By Mr. Young:

Q. Who came to this house during the time you worked there?

(Testimony of Lucy McGuire.)

A. Soldiers was the only ones allowed in.

Q. Did they come regularly or did they come at any special time? A. They came regular.

Q. Regular? A. Yes.

Q. Did you ever touch this switch at any time you were in this house? A. No.

Mr. Dwight: Objected to as already asked and answered, incompetent and irrelevant. [177]

By Mr. Young:

Q. Did you ever touch this switch?

A. No.

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial

The Court: Objection overruled.

By Mr. Young:

Q. What part of this house did "Speed" Warren generally frequent while you were there?

A. Beg pardon?

Q. What part of this house did she usually stay in? A. Upstairs.

Q. Now, while this was going on downstairs that you have testified to by the soldiers, did you have any particular duties to perform while these soldiers were downstairs with the girls?

A. No, I was most of the time—I was upstairs most of the time.

Q. While these people were in there, did you have any special thing to do?

(Testimony of Lucy McGuire.)

A. When she wasn't there, she would tell me to go and knock on the door when fifteen minutes were over.

Mr. Dwight: May I have my same objection and exception to this line of testimony?

The Court: You may. Let the record so show.

By Mr. Young:

Q. Now, with reference to the front of the house, Miss McGuire, will you state what kind of walls there are near the front door? Did you get my question? With reference to the front door here (indicating), can you state what [178] kind of walls are on both sides of that door, what they were made of, what material? A. I don't remember.

Q. You don't recall whether there was a wooden wall on each side? Was it a screen or what?

Mr. Dwight: I object as already asked and answered, being very leading.

Mr. Young: Read the last question.

(The last question was read.)

A. On this side there was a screen (indicating).

Q. Will you point exactly where that screen was?

A. On this side there was a screen (indicating).

Mr. Dwight: The witness indicates the left side of the house.

A. Right here by the door there is a screen (indicating); here is all wall (indicating).

(Testimony of Lucy McGuire.)

By Mr. Young:

Q. That is a wood wall? A. Yes.

Q. Do you recall whether or not that screen is open or covered? A. Well, it is open.

Q. It is to the left of the door? A. Yes.

Q. Could you see in the house or out of the house through that, just looking at it?

A. No, she had a cloth over there.

Q. She had a cloth over there? A. Yes.

Q. Is that the cloth on the outside of the house or inside? [179] A. Inside.

Mr. Young: No further questions. Your witness.

Cross Examination

By Mr. Dwight:

Q. How long did Lou Rodgers live in the house?

A. I don't know.

Q. You don't know when she left?

A. She left on August 4th.

A. Are you sure? A. Yes.

Q. Who gave you that date?

A. Because I was there at the time.

Q. How did you come to the conclusion that it was August 4th?

A. Well, I know for sure. I was there at the time.

Q. You were there at the time that she left?

A. Yes.

Q. And you started to work for "Speed" in June or July; that is right? A. Yes.

(Testimony of Lucy McGuire.)

Q. Sometime after you started working there Lou Rodgers left, didn't she? A. Yes.

Q. Now, did Lou Rodgers tell you that it was August 4th?

A. No, I didn't talk to Lou Rodgers.

Q. How did you come to that date?

A. Because I know it.

Q. Definitely sure about it, August 4th. Did she [180] come back and move in?

A. No, she did not come back.

Q. You saw her leave? A. Yes.

Q. All right. Who did she leave with?

A. By herself.

Q. At day or night time?

A. She left in the night and did not come back no more.

Q. She didn't come back, just went off on a drunk?

A. No, she didn't go on a drunk. She just went to her own house.

Q. She had another house?

A. She had her own place. She had a house, still she was staying with "Speed".

Q. Now, when did you leave "Speed's" employ?

A. March 15th.

Q. 1937? A. 1937.

Q. How did you happen to give your statement in this case? A. Because they came for me.

Q. Who came for you? A. Policeman.

Q. A policeman in company with whom?

(Testimony of Lucy McGuire.)

A. By himself.

Q. You were taken down to the Police Station?

A. Yes.

Q. You were questioned down at the Police Station? A. Yes. [181]

Q. Do you remember what date that was?

A. No.

Q. Do you remember the date when the man died up there? Was it after that date?

A. It was after that, yes.

Q. You know how many days after?

A. No.

Q. You went down to the Police Station?

A. Yes.

Q. And did they show you a lot of wire and things down there,—Captain Hays?

A. No, just the door.

Q. They showed you a door. Show you some wire? A. No.

Q. They didn't. They asked you about that door?

A. That is the way.

Q. What was the first question they asked you?

A. I don't remember.

Q. You don't remember. So they showed you this door? A. Yes.

Q. Then they started to ask you? A. Yes.

Q. They asked you what you knew about that door? A. Yes.

Q. They asked you if you knew who fixed up that door? A. Yes, but I don't know.

(Testimony of Lucy McGuire.)

Q. You don't know? A. No.

Mr. Young: I object to this line of testimony. The proper procedure is to ask her. [182]

The Court: It is.

(The last question and answer were read.)

By Mr. Dwight:

Q. Then they began to ask you about a switch?

A. Yes.

Q. Then you told them about a switch?

A. Yes.

Q. Then they asked you about a transformer?

A. No, I already knew that.

Q. They didn't ask you about a transformer?

A. No.

Q. They asked you where the switch was?

A. Yes.

Q. Did they show you a switch? A. No.

Q. What else did they ask you about?

A. It has been so long I don't remember.

Q. Oh, I see. Did they ask you anything about the window upstairs? A. No, not at the time.

Q. Not at the time. He asked you about that over here, Mr. Young?

A. No, I told him myself.

Q. All right. How did you [illegible]t of that window?

A. There is a screen; you op[illegible]reen and look out.

(Testimony of Lucy McGuire.)

Q. In other words, there is a screen; you have to open the screen, poke our head out and that is the only way you can see that door? A. Yes.

Q. You can see it standing inside with the screen closed? [183] A. No.

Q. You have to poke your head out?

A. Yes.

Q. When you said on direct examination, Miss McGuire, that you saw Lo Rodgers look out of the window,—she stuck her had out,—she would have to open the screen and stik her head out and look down? A. Yes.

Q. Same way with Mrs Warren? A. Yes.

Q. Now, you used the expression in here—I will withdraw that question. You spent most of your time upstairs? You were Mrs. Warren's maid?

A. Yes.

Q. You said something about a box, money box?

A. Yes.

Q. You said they had times on them?

A. Yes.

Q. You put some money in there? A. Yes.

Q. *How*, how many times have you been bitten by that door? A. One.

Q. And you say it was raining hard?

A. Yes, it was raining.

Q. You went outside to put the garbage out, then you came back in and got a shock?

A. When I was going out I got a shock; my hands were wet.

(Testimony of Lucy McGuire.)

Q. It had been raining hard. When it rains hard the [184] water runs down?

A. It is level; the water can get in.

Q. It was wet that night? A. Yes.

Q. You touched the door; you got a shock?

A. Yes.

Q. You say Mrs. Warren told you that that was put there to scare away the soldiers? A. Yes.

Q. Did she say what kind of soldiers, drunken soldiers or sober soldiers?

A. Drunken soldiers.

Q. Have you ever had any trouble down there with drunken soldiers? A. Sometimes.

Q. She also told you that in case you were raided, if she was arrested, to telephone to the lawyer? A. Yes.

Q. That is all she said, "He would know what to do"? A. Yes.

Q. Now, when you got the shock you say Mrs. Warren started laughing and said, "Don't touch the door". Did she tell you anything else?

A. She said it was loaded with electricity.

Q. You touched it and got shocked?

A. Yes, I did.

Mr. Dwight: No further questions.

Redirect Examination

By Mr. Young:

Q. Now, Miss McGuire, when did you leave the employ [185] of "Speed" Warren?

A. March 15th.

(Testimony of Lucy McGuire.)

Q. What year? A. 1937.

Q. You have testified that Lou Rodgers left there on August 4th? A. Yes.

Q. Now, was it before August 4th or after that you received this shock?

A. It was before; Lou Rodgers was still there.

Q. How long before? A. I am not sure.

Q. Just give us your idea. How long before?

A. It was about two or three weeks.

Q. It was about two or three weeks before August 4th that you received this shock?

A. Yes.

Q. Do you know whether or not—Do you know John Kiehm? A. Yes.

Q. Had you seen him around that house at any time? A. Yes.

Q. Did you ever see him do any work?

A. He came to do some work there.

Mr. Dwight: If counsel wants to reopen his direct examination, I will consent.

The Court: You wish to reopen your direct?

Mr. Young: Yes, with your Honor's permission.

Q. What did you see John Kiehm do, if anything around the house?

A. He came to fix the door bell, and he fixed something [186] in the back door. I don't remember what it was.

Q. Was that before you received the shock?

A. I received the shock already.

Q. Then he came?

(Testimony of Lucy McGuire.)

A. Yes, he fixed the door bell.

Q. Did you ever get a shock after that?

A. No.

Q. Are you sure about that? A. Sure.

Q. Will you tell what lawyer it was?

Mr. Dwight: I will admit it. I have been her lawyer for eleven years, if counsel wants to know.

By Mr. Young:

Q. You have testified that "Speed" had to push the wire screen out? A. Yes.

Q. Did she do that often?

A. On paydays mostly.

Q. Why did she do that?

Mr. Dwight: Objected to as calling for the conclusion of the witness.

The Court: Objection sustained.

By Mr. Young:

Q. Why did she do that?

A. Just to see if they were soldiers. If they were not soldiers, they weren't allowed in the house.

Q. What was the procedure when someone came to the door? What would happen when someone came to the door?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial. [187]

Mr. Young: It is very relevant.

The Court: Objection overruled.

Mr. Dwight: Exception.

(Testimony of Lucy McGuire.)

By Mr. Young:

Q. What would take place when some soldier came to the door, some man?

A. We would open the door, let him in and take him into the reception room downstairs and ask him if he wanted to see a girl.

Q. When a man first came to the door——

A. Because they ring the door bell.

Q. (Continuing) where would you look out from, from the window?

A. Sometimes she looked out the door, just looked out the door.

Q. If it is a soldier, you would let him in?

A. Yes.

Q. Now, everything that you have told us here is what you remember of the house, what you know, what you told us here? A. Yes.

Q. Based on your own memory? A. Yes.

Mr. Young: No further questions.

Recross Examination

By Mr. Dwight:

Q. After Lou Rodgers left "Speed"—Where did you go to work after you left Mrs. Warren? Where did you go to work?

A. When I left "Speed's", she didn't pay me. I didn't have any money. I went over to Lou's. [188]

Q. By "Lou's" you mean Lou Rodgers?

A. Yes.

(Testimony of Lucy McGuire.)

Q. When did you move in with Lou Rodgers?

A. March 15, 1937.

Q. You are still with Lou? A. No.

Q. When did you leave Lou?

A. June 17th.

Q. You left Lou Rodgers on June 17th?

A. Yes.

Q. And while you were with Lou Rodgers, did you talk this case over with her? A. No.

Q. And you want this Court and jury to believe that you know definitely that Lou Rodgers left on August 4th? You have your own independent memory of that date, eh? A. No.

Q. Where did you get that August 4th from?

A. Lou Rodgers told me, yes.

Q. Exactly. Lou Rodgers told you when you came into Court?

A. Lou Rodgers left on August 4th.

Q. That is the only thing you talked about?

A. Yes.

Q. You didn't talk about this electrical equipment? A. No, I already knew about it.

Q. Did you refresh your memory with Miss Rodgers? A. No.

Q. You didn't talk about it at all? A. No.

[189]

Q. And what was Lou Rodgers doing down in that house while you were there living with her?

A. She was one of "Speed's" girls.

(Testimony of Lucy McGuire.)

Q. "Speed's" what? I mean after she moved out, when you were down there at her house. What was she doing?

A. Same thing as "Speed" was *going*.

Q. Operating a house of prostitution?

A. Yes.

Q. She was arrested while you were there?

A. I don't remember.

Q. You don't remember. Did you talk to anybody else besides Lou Rodgers about this case?

A. No.

Q. Nobody. You have already told me about talking to the police. Just the police?

A. They brought me to the police headquarters.

Q. Then you talked to Mr. Young?

A. Yes.

Q. Then you talked to Lou Rodgers?

A. Yes.

Q. Have you seen Lou Rodgers since she testified the last time she was in?

A. She left; I haven't seen her.

Q. Did you talk to her out here? A. Yes.

Q. Did you talk about her testimony out here?

A. No, we didn't talk about this case or what she said. We was told not to talk about it. A fellow told me not to talk about it.

Q. Who was that man? [190]

A. He isn't here.

Q. You mean somebody that works for the Public Prosecutor's Office?

(Testimony of Lucy McGuire.)

A. I don't know who he is. He told us not to talk about what happens in here.

Mr. Dwight: I think that is all.

Redirect Examination

By Mr. Young:

Q. This was June 1937 that you left there—I mean you left Lou Rodgers place? A. Yes.

Q. June last year? A. Yes.

Q. Before the death of this man?

A. Yes, I went down to Haleiwa and worked.

Q. Have you worked for Lou Rodgers since that date? A. No.

Rerecross Examination

By Mr. Dwight:

Q. When did you work for Mrs. Warren?

A. In July or August.

Q. Of what year? A. 1936.

Q. 1936? A. Yes.

Q. When did you leave? A. 1937.

Q. 1937? A. 1937.

Q. What month? [191] A. March 15th.

Q. That was before this accident happened out there? A. Yes.

Q. And you were working for Lou Rodgers when the accident happened?

A. No, I was down Haleiwa working.

Q. Now, when did you talk to Lou Rodgers about this August 4th, the date that she left? When did you talk?

(Testimony of Lucy McGuire.)

A. The other day in here she just told me.

Q. The other day in here. That was after Lou Rodgers had testified in this trial?

A. She didn't say anything; she was told not to talk about it.

Q. Then she came out and told you she had left on August 4th? A. Yes.

Q. That is why you are testifying to it it was August 4th? A. Yes.

Mr. Dwight: No further questions.

Reredirect Examination

By Mr. Young:

Q. Miss McGuire, when is your best recollection, irrespective of what she told you, when did she leave?

A. I know it is somewhere around August.

Q. From your own recollection, it would be August? A. Yes, it was August.

Mr. Young: No further questions. [192]

Rererecross Examination

By Mr. Dwight:

Q. She didn't leave on the 11th of September or the 12th of September? A. Eh?

Q. Lou Rodgers didn't leave "Speed" Warren on the 12th of September?

A. No, I know it was in August.

Q. You are sure of that?

A. I know it was August.

Mr. Dwight: That is all.

Mr. Young: That is all.

The Court: All right. Witness excused.

JAMES P. MICHELS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. James P. Michels.

Q. What is your profession, Mr. Michels?

A. I am in charge of the Distribution and Transmission Department for the Hawaiian Electric Company.

Q. Mr. Michels, I will appreciate if you repeat that over again, what you are.

A. I am in charge of the Distribution and Transmission Department for the Hawaiian Electric Company.

Q. And your duties are, briefly, in regard to that?

A. I have charge of the installation of all the wires on the Island here. [193]

Q. On this Island? A. On this Island.

Q. Does that include all the wires leading from the various substations and from poles into homes? You would have supervision of that?

A. Yes, sir.

(Testimony of James P. Michels.)

Q. You have charge of any of the records as to who is furnished electric light and power, for your Company? A. We keep records.

Q. In your official position? A. Yes.

Q. Are you acquainted with the Wahiawa District, as far as the power line is concerned?

A. Yes.

Q. Will you state whether or not on August 3, 1937, your Company was furnishing power,—electric light and power to a person by the name of Ilene Warren, alias "Speed" Warren?

A. May I be allowed to refer to this? (Referring to papers.)

Q. Those are the official records of your Company?

A. These are, just a meter record. (Referring to paper.) The name is I. C. Warren.

Q. What address?

A. Wahiawa; two-story green house, second house from Hawaiian Electric Company substation.

Q. And was that the party being furnished electricity from the Hawaiian Electric Company?

A. Yes, sir.

Q. On that date, August 3, 1937? [194]

A. Yes, sir.

Q. Do you know what voltage was going into that house from the line?

Mr. Dwight: From your own knowledge.

(Testimony of James P. Michels.)

By Mr. Young:

Q. From your official position, your own knowledge?

A. We have what you call a three-wire service feeding that house 110 volts. It was 115 volts at that time from each outside wire to the ground, 230 volts between the two outside wires.

Q. Now, this voltage you are testifying, is that the voltage that actually went into the house through the fuse plugs, 110 volts?

A. 115 volts it was.

Q. Do you know the short-circuit value of that line out there?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, as calling for the conclusion of this witness without any proper foundation being laid to establish him as an expert.

Mr. Young: He is Superintendent of this Pole and Line Department.

Mr. Dwight: I will ask that the question be read.

(The last question was read.)

The Court: Will you reframe that question?

By Mr. Young:

Q. Mr. Michels, do you know the short-circuit value of the line from which Mrs. Warren's house is fed with electricity? [195]

A. The low voltage of the wires feeding into her house?

Q. Yes.

(Testimony of James P. Michels.)

A. I can only give you it approximately.

Mr. Young: I will withdraw the question.

Q. Now, are you acquainted with the Wahiawa District, the geography of the streets?

A. Yes, sir.

Q. Will you step down to this Exhibit? This is Prosecution's Exhibit "A" in evidence. (Indicating Exhibit "A" tacked on the blackboard.) (The witness steps down to the blackboard.) This is a plat of a certain district in Wahiawa; Muliwai Avenue (indicating); Neal Avenue (indicating); Kuahiwi Avenue (indicating); Olive Avenue (indicating) . The black circles indicate light poles (indicating); this indicates court house (indicating). Now, with reference to the poles on this diagram, will you state where this home is getting electricity?

A. From Hawaiian Electric Company.

Q. I believe your testimony said two poles?

A. That would be the second house (indicating on Ex. A.)

Q. That would be the second house from the Hawaiian Electric Substation? A. Yes.

Mr. Young: Let the record show that the witness pointed to a house marked "D" and the named "Mary P. Paulos."

The Court: Let the record so show.

By Mr. Young:

Q. Your records show it was the name of "I. C. Warren?" [196] Is that correct? A. Yes.

(Testimony of James P. Michels.)

Q. With reference to this whole plat in here, do you know whether or not the houses are furnished with electricity from the Hawaiian Electric Company?

A. I know those that are supplied with electricity are supplied from our lines. No one else supplies electricity.

Q. And the voltage going into any of those houses on August 4, 1937, would be what you testified to? A. 115 volts.

Q. 115 volts. Now, do you in your duty as Superintendent of the Pole and Light Division—you have charge of the men who handle electricity?

A. Yes, sir.

Q. Does the Hawaiian Electric Company have any rule as to dangerous voltages?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial what the rule of the Hawaiian Electric Company is.

The Court: Objection sustained.

Mr. Young: No further questions.

Cross Examination

By Mr. Dwight:

Q. Mr. Michels, you say that there was a high power line running up along Muliwai Street?

A. Yes, sir.

Q. From down there at the substation?

A. Yes, sir.

Q. What was the voltage on that power line?

(Testimony of James P. Michels.)

A. We have several high power lines. The top circuit [197] on the pole is 44,000; the circuits on the next arm are 4,000; two circuits.

Q. What is the grade of wire that you are using on that main line to carry that 44,000 volts? Will you describe the wire used?

A. The top line is No. 10, medium, hard-ground, bare.

Q. Did you receive any complaints about sparks flying off that wire?

Mr. Young: I object. When?

Mr. Dwight: Say during June, July, August of 1937.

A. When did he die?

Mr. Young: 1937.

By Mr. Dwight:

Q. During the year 1937.

A. I think we had one complaint come in as a radio interference complaint.

Q. You didn't get any complaint about flames flying anywhere from ten to twenty feet off these lines when it was raining? A. No, sir.

Q. Never got such a complaint? A. No.

Q. Who is the name of your trouble man down there? A. Keahi.

Q. Do you keep a record of complaints?

A. Yes.

Q. Now, referring to this wire, No. 10, medium, hard-ground, bare, that is not the first grade wire? It is inferior wire. [198] A. No, it is not.

(Testimony of James P. Michels.)

Q. Is that wire permitted by the Utilities Commission? A. Yes, sir.

Q. The type of wire that is on there now?

A. Yes, sir.

Q. That wire has not been changed?

A. No, sir.

Mr. Dwight: That is all.

Redirect Examination

By Mr. Young:

Q. Now, Mr. Michels, are you personally acquainted with the home of I. C. Warren?

A. I have no personal acquaintance with it.

Q. You have never seen that home?

A. I have passed by. I have never paid any attention to it.

Q. Would you know a picture of it if you saw it?

A. I don't believe I could absolutely recognize it.

Mr. Young: That is all. [199]

EDWARD J. BURNS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Edward J. Burns.

(Testimony of Edward J. Burns.)

Q. What type of work do you do, Mr. Burns?

A. Police work, sir.

Q. How long have you been a police officer?

A. About a year and three months.

Q. About a year and three months?

A. That, sir.

Q. When did you first join the department, police department? A. November 16, 1936.

Q. And that is the Police Department of the City and County of Honolulu?

A. That is right.

Q. Were you a police officer on August 3, 1937?

A. I was.

Q. And at that time what were *you* general duties? What part of the police work were you in?

A. At that time I was on the midnight shift, working from twelve midnight to eight o'clock in the morning as a foot patrolman.

Q. On that date, August 3, 1937, do you recall whether or not you had any special duty?

A. Yes, sir.

Q. Will you please tell the Court and jury what your special duty was that night, what you did? [200]

A. I was assigned *to with* Captain Caminos to Wahiawa.

Mr. Dwight: May it please the Court, at this time I want to object to the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial; upon the further ground that it will tend to bring the reputation and character

(Testimony of Edward J. Burns.)

of the defendant directly in issue, the reputation and character of the defendant not having been brought in issue; upon the further ground that any evidence of this witness by observation in the house was illegal and in violation of the Fourth and Fifth Amendments of the Constitution.

The Court: The Court will overrule the objection.

Mr. Dwight: Save an exception.

The Court: Exception may be saved and noted.

By Mr. Young:

Q. Pick up where you left off.

A. I was assigned by Captain Mookini to go with Captain Caminos to Wahiawa to raid the house of "Speed" Warren. We left the Honolulu Police Station at about 5:30 p. m. on August 3, 1937. We arrived at Wahiawa and left the Wahiawa Police Station at about 8:45 p. m.,—Captain Kalauli, Captain Caminos, Officer Chun, Officer Apoliona, Officer Kam Yuen, the deceased and myself.

Q. You say "the deceased"; who do you mean?

A. Wah Choon Lee.

Mr. Dwight: May I have an additional ground of objection, for the record and that is that any [201] evidence that this officer secured was secured without the consent of the defendant and in violation of her rights under the constitution.

Mr. Young: This is a little premature.

(Testimony of Edward J. Burns.)

Mr. Dwight: I don't like this system of putting things in.

The Court: Objection overruled.

Mr. Dwight: Exception.

By Mr. Young:

Q. Would you know the picture of Wah Choon Lee, if you saw it again? A. I would, sir.

Q. I show you Prosecution's Exhibits in evidence "B" and "C". (Handing same to the witness.) Will you examine these pictures?

A. (Examining the same) Both of these pictures are his pictures.

Q. Pictures of Wah Choon Lee. You may proceed.

Mr. Dwight: I would like to hear some questions. I want to object, if they are improper.

By Mr. Young:

Q. You may proceed with your narrative, telling what happened.

Mr. Dwight: I submit the prosecution has a right to question this man. I have a right to object before the narrative comes in.

Mr. Young: He can tell what he knows.

Mr. Dwight: He may get up and testify to things that are incompetent.

The Court: Will you please ask him? [202]

By Mr. Young:

Q. Mr. Burns, you say you went with these seven officers? A. Seven of us altogether.

(Testimony of Edward J. Burns.)

Q. Did you gather at the Wahiawa Police Station? A. We did, sir.

Q. Where did you go from there?

A. We left the Police Station and walked along Kuahiwi Street, where I left the six others, walked up Neal Street, turned down Muliwai and went to "Speed" Warren's place.

Q. How were you dressed?

A. I had on a grey suit, black shoes.

Q. How were the other six officers dressed?

A. All of us were in civilian clothes at the time.

Q. You were all in civilian clothes?

A. That is right, sir.

Q. You say you left them where?

A. At the railroad track crossing prior to leaving Neal Street.

Q. You went from there to the home of "Speed" Warren? A. That is right, sir.

Q. Will you step down to this diagram a moment, please?

A. (The witness steps down to the blackboard on which was tacked Exhibit "A").

Q. Referring you to Prosecution's Exhibit "A" in evidence, that is, just briefly, *te* names of the streets, California Avenue (indicating), Muliwai Avenue (indicating), Kuahiwi Avenue (indicating), the court house (indicating) and the railway track (indicating) down here, are you familiar enough with this to testify? A. Yes. [203]

(Testimony of Edward J. Burns.)

Q. Starting from the court house, will you please trace the route that you took to "Speed" Warren's place?

A. We left the court house here (indicating on Ex. "A"), walked along this way over to here (indicating), where I left the other six officers. They turned up this way (indicating); I continued on this way over to "Speed" Warren's house (indicating on Ex. "A").

Q. And when you got to this point (indicating), that is, in front of "Speed" Warren's house, what did you do when you reached the house? Just tell us.

A. I knocked on the wall next to the front door, and no one answered so I walked out to the road to see if there was another entrance to the house and walked back again to the front door and again knocked on the wall. This time somebody stuck their head through the screen window upstairs. I couldn't see who it was. I knew it was a woman but I couldn't see who it was. I heard footsteps and someone came to the door, looked out, then opened the door and said, "Hello"; I said, "Hello"; she said, "How are you?"; I said, "Fine". This was Billie Penland.

Q. Would you know this person again if you saw her?

Mr. Dwight: I move to strike that testimony as hearsay, conversation between the witness and Billie Penland, not being made in the presence of the defendant.

(Testimony of Edward J. Burns.)

The Court: The motion will be granted, and the statement made by Miss Penland not in the presence of the defendant will be stricken and the jury asked to disregard it. [204]

By Mr. Young:

Q. What kind of a door was this that you saw from the outside after knocking?

A. It appeared to be a thick wooden door, a metal plate on the outside, a glass partition through which one will be able to see up about the average height of a person.

Q. Did the door open in or out?

A. The door opened outwards.

Q. And you say there was a metal plate. Will you describe that metal plate more particularly?

A. The metal plate extended from a little below the window, the pane in the door, to about a foot from the bottom of the door. It was about the width of the door.

Q. Was there any knob or handle on the outside of that door?

A. No, sir, just the outside of the lock.

Q. You say you met this girl, Billie Penland let you in? A. That is right, sir.

Q. After you went in, where did you go?

A. I followed her into the parlor, where she stopped by a wicker table and asked me a question.

Q. Then what happened?

A. I followed her into a room in which there was a bed and dresser and a washstand, and as she

(Testimony of Edward J. Burns.)

stood by me I took off my necktie and started to take off my coat and reached into my pocket and said, "How much?"

Mr. Dwight: Well, I think the Court should remind this witness that he can't testify to hearsay. I ask the Court to instruct the jury to dis- [205] regard that.

The Court: That answer will be stricken from the record. The Court instructs you not to testify as to any conversation not in the presence of the defendant on the ground it is hearsay. The jury is asked to disregard it.

By Mr. Young:

Q. Did you have a conversation with her in that room? A. I did.

Q. As a result of that conversation, did you do anything? A. I gave her three dollars.

Q. Did she take the three dollars?

A. She took the $3.00 and a basin of water from the washstand and walked out of the room through the back door.

Q. When you first went in that room was the door open or closed? A. I don't recall.

Q. After you got in the room was anything done about the door? A. She shut the door.

Q. Before you gave her this money was the door closed? A. Yes, sir.

Q. And she left by the back door of the room?

A. That is right.

(Testimony of Edward J. Burns.)

Q. Which door did you come in?

A. The front door, sir.

Q. That is the door that leads from which room of the house?

A. From the living-room downstairs.

Q. Was there anyone else in the living-room downstairs [206] when you walked through there with Billie Penland?

A. There were two men, one Charles Erpelding; the other one I didn't see him afterwards so I don't know who he was.

Q. After Billie Penland left the room, how long was it—Did she come back?

A. She came back into the room. I was undressing, had already taken my shoes off and she left the room again by the back door. She came back in the room again by that back door and I had completed undressing. She then reached in the washstand or the bureau drawer and got a towel out and someone came to the back door of the room. She stepped out of the room and a conversation ensued. She came back into the room and someone came to the front door of the room, Marjorie Scott, and some conversation was passed between them about a taxi. The front door of the room was closed again. She went over to the bed and took off her house robe, sat down on the bed, and I reached into the inner breast pocket of my coat, which was lying on top of the bureau, took out a handkerchief, from

(Testimony of Edward J. Burns.)

which I took my badge and police whistle, blew the whistle three times, showed her my badge and told Billie Penland I was a police officer and that she was under arrest for investigation.

Q. Now, at the time you blew your whistle, did Billie Penland have any clothes on?

A. No, sir.

Q. Did you have any? A. No, sir.

Q. About how long was it after you reached the front [207] door was it until you blew your police whistle, if you recall?

A. From the time that I entered the house until I blew my whistle, sir?

Q. Yes. About ten minutes, sir.

Q. About ten minutes. Now, what happened after you blew your police whistle?

A. After I blew my police whistle someone came to the front door of the room, Marjorie Scott, just opened the door. I believe I told her that she was under arrest and she slammed the door.

(The last answer was read.)

Mr. Dwight: I move to strike that part of the testimony as incompetent, irrelevant and immaterial.

The Court: Motion granted.

Mr. Young: May we have our recess?

The Court: It is 12 o'clock. We will adjourn until two o'clock.

Mr. Dwight: I have some matters that are rather urgent. I would like to have an adjournment until tomorrow morning.

(Testimony of Edward J. Burns.)

The Court: What is it you have, some court appearances?

Mr. Dwight: Court appearances and some legal research. I didn't know this witness was going to be called. They have just made their return at the last session. It has been the usual practice to proceed in the morning. The jurymen are all business [208] men and they have to attend to their business. May we hold it up? I want to see the witness I had called.

The Court: Just a minute.

Mr. Dwight: There is one witness that testified this morning. I want to ask her just one more question.

The Court: (To the witness.) Step down.

LUCY McGUIRE,

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Cross Examination

(Continued)

By Mr. Dwight:

The Court: You are under oath.

By Mr. Dwight:

Q. Miss McGuire, at any time during the period that you were employed by Mrs. Warren, did you ever see any "No Trespassing" signs on her premises? A. Yes.

(Testimony of Lucy McGuire.)

Q. And they were large signs? A. Yes.

Q. Visible to any one that wanted to look?

A. Yes.

Q. How many were on there? How many "No Trespassing" signs did you see?

A. I only saw one.

Q. That was in the front? A. Yes.

Q. That was in the vicinity of this area along in here with reference to this hedge (indicating on Ex. "G")? [209] A. Yes.

Mr. Dwight: That is all.

Redirect Examination

By Mr. Young:

Q. With reference to these pictures, can you show us where this sign was located (Referring to Exhibit "G")? A. I can't say.

Q. Get up close. This is the front of the house (indicating). Are you sure there was such a sign?

A. Yes.

Recross Examination

By Mr. Dwight:

Q. Was the sign in about this locality over here (indicating)? Was it not here (indicating)? It is here (indicating on Ex. "G"), isn't that it?

A. It was about there (indicating).

Q. Here is the garage (indicating);—I don't know when these pictures were taken—here's the garage (indicating); here's the house (indicating); now, where is the sign, over on the other side of the garage?

(Testimony of Lucy McGuire.)

A. I know there was one but I don't remember where.

Q. You remember definitely there was a big "No Trespassing" sign?

(There was no answer.)

Redirect Examination

By Mr. Young:

Q. How big was the sign?

A. It was a big board.

The Court: The Court will adjourn on Mr. Dwight's representations until 9:00 o'clock. The jurors are under the same instructions not to discuss the case. [210]

Mr. Young: May the records show the Territory's objections?

The Court: The record may so show. Adjourn until tomorrow morning at 9:00 o'clock.

(A recess was taken until Tuesday, February 8th., 1938 at nine o'clock a. m.) [211]

Honolulu, T. H. Feb. 8, 1938.

(The trial was resumed.)

The Clerk: Territory of Hawaii vs. Ilene "Speed" Warren, further trial by jury.

Mr. Young: Ready for the Territory.

Mr. Dwight: We are ready for the defendant.

Mr. Young: Stipulate the defendant and jury are present.

Mr. Dwight: It may be so stipulated.

The Court: Let the record show that it is stipulated the defendant and the jury are present and both counsel are ready.

EDWARD J. BURNS,

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Young:

Q. Mr. Burns, will you please draw, if you can, a rough diagram of what you know about this house, from what you saw that night?

Mr. Dwight: May he draw a plan before it is shown to the jury? I might want to cross examine him before it is shown to the jury.

The Court: Turn the board.

(The blackboard was turned with the back of same towards the jury.)

By Mr. Young:

Q. Mr. Burns, if possible, draw it with Muliwai street on the top, that is, in the same relation as this big diagram. [212]

The Court: Let the records show that Mr. Burns is still on direct examination.

A. (The witness draws on a sheet of paper.)

By Mr. Young:

Q. Is that the part that you know of that house?

A. Yes.

(Testimony of Edward J. Burns.)

Mr. Dwight: May I be permitted to cross-examine him as to his knowledge of the diagram?

The Court: Yes.

Cross Examination

By Mr. Dwight:

Q. Mr. Burns, is that the plan of the house as you remembered it from experience in going in there? A. Yes.

Q. Did any of this knowledge come to you by virtue of your second entry some time after 12:00 o'clock at night? A. No, sir.

Q. Just your first entry?

A. That is right, sir.

Q. And you never checked maps in the Building Inspector's or in the District Attorney's office?

A. I didn't check any maps.

Q. You never checked any maps?

A. I never checked any maps from the District Attorney's office. I saw a map of the floor plan of the house.

Q. Where did you see that map of the floor plan of the house?

A. At Mr. Young's office. I checked it.

Q. That is where you gathered that information? [213] A. Yes.

Q. Well, did that help you out in drawing this plan today? A. I wouldn't say so.

Q. Was your memory any better on that at 9:00 o'clock on the morning of January 24, 1938, than it is today, or is your memory better today?

(Testimony of Edward J. Burns.)

A. I would say that it is about the same.

Q. It is about the same, and when you drew the plan on January 24, you say your memory was just the same?

A. I would say about the same.

Q. Did you examine any of these inside plans between January 24th and the time you took your oath here yesterday? A. Yes.

Q. When did you examine the inside plan of the house? A. I saw one this morning.

Q. This morning? A. Yes.

Q. You saw that in Mr. Young's office?

A. Yes.

Q. You checked the plan rather carefully?

A. No.

Q. Just looked at it? A. That is correct.

Mr. Dwight: That is all. I am going to object, may it please the Court.

Mr. Young: I haven't finished with this.

Direct Examination

(Continued)

By Mr. Young:

Q. Mr. Burns, what you have drawn on the board, is this from your own memory of what you saw that night on your first entry, or has it been influenced by any diagrams or [214] plans you have seen?

A. I would say that is from my own memory.

Q. You haven't drawn a complete plan of the house? A. No.

(Testimony of Edward J. Burns.)

Q. Why haven't you filled that in?

A. I didn't see those at that time.

Q. On cross-examination you testified you drew another plan. Was that as carefully drawn as this is? A. No.

Q. Did you use any ruler to draw that plan?

A. I don't think so.

Q. Just free hand? A. Yes.

Q. To your best recollection, is that a correct plan? A. Yes.

Mr. Young: I submit he is qualified.

Mr. Dwight: I object on the ground he has used other information other than the information at the time of his entry.

The Court: Objection overruled.

Mr. Dwight: Exception noted.

The Court: Exception noted.

Mr. Young: May this be marked Territory's next exhibit for identification?

The Court: It may be entered as "Prosecution's Exhibit K for identification."

(The diagram referred to was marked "Prosecution's Exhibit K for Identification.")

[215]

Mr. Young: (To the jury) Can you gentlemen see these marks from the back there?

(Some of the jurors nodded in the affirmative)

Q. Now, Mr. Burns, is this Muliwai street up here (indicating on Exhibit "K".)? A. Yes.

(Testimony of Edward J. Burns.)

Q. Will you please mark with this pencil where the front door in that house is?

A. (The witness marks as directed.)

Q. Now, on your direct examination you testified something about stairs. Will you indicate on this diagram where these stairs are that you were testifying to?

A. (The witness marks as directed.)

Q. Now, what is that writing you are putting on the board at those different places?

A. This is a stairway that leads from the hallway to a room upstairs (indicating on Exhibit "K".) This is a back stairs that leads from the hallway to some place upstairs (indicating on Exhibit "K".)

Q. Do you know where it leads?

A. No, sir.

Q. Now, will you just follow the other line you have on the board and explain to the jury what they are?

A. This is a hallway, (indicating) to which entrance is gained by the front door. This is a doorway to the room upstairs (indicating.) This is a doorway that leads from the hallway into the living-room (indicating.) This is a doorway that leads into the little room that Miss Penland and I went. This is another doorway (indicating.) This is a hallway in the back of the house. [216]

Q. You do not have any other rooms here. Do you know whether there are any other rooms there or not? A. No.

(Testimony of Edward J. Burns.)

Q. You have two openings in these rooms here (indicating.) What do they represent?

A. This is the front door (indicating); this is the back door (indicating.)

Q. Now, Mr. Burns, you came into the house, you testified, and met a person by the name of Billie Penland? A. That is right, sir.

Q. Will you please trace the course that you took on the bottom floor of that house with Billie Penland with this blue pencil? Just draw the course you took from the front of the house.

A. Miss Penland met me at the front door here, (indicating) I followed her through this doorway into the living room. We stopped by a wicker table that was located about here (indicating) and we continued on. She led me into this room here (indicating.) (The witness traced in blue pencil the course he took.)

Q. Will you mark that room? What is it, bedroom?

A. Yes. It is probably used for a bedroom. There is a bed in there.

Q. Just put "Bed" in there.

A. (The witness writes "Bed" as directed.)

Q. Now, you testified as you came into that room, you saw two other men in there?

A. That is right, sir.

Q. Do you recall how these men were dressed?

A. I believe both of them were dressed in civilian [217] clothes.

(Testimony of Edward J. Burns.)

Q. Will you just put a circle just where each man was, as you recall?

A. (The witness draws circles as directed.)

Q. Now you testified you were in a room.

Mr. Dwight: You mean these circles?

By Mr. Young:

Q. The Circles represent two men?

A. Sitting down.

Q. That is your approximate location, each circle represents a man? A. Yes.

Q. Now, after you were in this room, with a bed in there, a short time, you blew your whistle, is that correct? A. That is correct.

Q. What door did Marjorie Scott come through, that you testified in your direct examination?

A. Marjorie Scott came through the front door.

Q. She is the first person that came into the room after you blew your whistle?

A. She is the first person that came, but didn't come in.

Q. How long after you blew your whistle did she make an appearance at that door?

A. About five seconds.

Q. Did any one else come to any door while you were in that room?

A. "Speed" Warren came through the back door of the bedroom. [218]

Q. About how long after you had blown your whistle? A. About ten seconds.

(Testimony of Edward J. Burns.)

Q. About ten seconds. Is that your best judgment? A. Yes, sir.

Q. She came to the back door. What did she do, if anything?

A. She came in the back door, told Miss Penland to get out of there. I advised her Miss Penland was under arrest; that I was a police officer. She insisted on Miss Penland leaving the room. I tried to detain Miss Penland by holding her. "Speed" Warren grabbed hold of my arms. Miss Penland ran out the front door of this room, ran toward the hallway, and I followed her. Miss Penland reached in the hallway and turned towards the front door and then turned back to the back stairway, and I caught her right here, when she turned back to the back stairway.

Q. What were you doing in the hallway after you caught her?

Mr. Dwight: May I have the last answer?

(The last answer was read.)

By Mr. Young:

Q. Did you follow Miss Penland through the living room, going back to the door?

A. That is right, sir.

Q. About how far behind her were you as she was running across the room towards the front door?

A. As I say, she was about here (indicating) and I came to the door, about the middle of the room, approximately twelve feet.

(Testimony of Edward J. Burns.)

Q. Approximately twelve feet. Did you gain on her, [219] catch up to her as she reached the hallway? A. Yes, sir.

Q. Did you ever lose sight of her for any time as she was running across the room?

A. No, sir, I did not lose sight of her.

Q. Did you see her at all times? A. Yes.

Q. You can take the stand, now. Was she within your full view all the time that she was in the hallway? A. Yes, sir.

Q. Now, when you say "Speed" Warren came into the room, who do you mean?

A. Ilene Warren, the defendant.

Q. Is she here this morning? A. She is.

Q. Had you ever seen her before that time?

A. No, sir.

Q. Can you identify her now? A. Yes, sir.

Q. Will you indicate where she is?

A. Sitting over there dressed in white (indicating the defendant.)

Mr. Young: Let the record so show.

The Court: The record will so show.

By Mr. Young:

Q. When you indicated you were a police officer did you do anything or say anything else?

A. At the time we were in that bedroom?

Q. Before Miss Penland ran out?

A. I told Miss Penland she was under arrest. I had [220] my badge in my left hand when she came

(Testimony of Edward J. Burns.)

at me. I didn't show it up to her face. When she came at me I had it in my left hand. I placed it on the bureau. She grabbed hold of my hand. I stated in my last testimony in the case that it seems to me that I believe she had seen it.

Q. Now, approximately how long did you struggle?

Mr. Dwight: I am going to move to strike that portion of the witness' answer where he says he believes she *showed* it.

Mr. Young: I have no objection.

The Court: The jury will be instructed to disregard that.

By Mr. Young:

Q. Approximately how long, to your best recollection, did you struggle with "Speed" Warren in the bedroom?

A. That was probably about from the time that she started struggling with me, sir, and the time I left her and started chasing Miss Penland.

Q. Yes.

A. That would have been about five seconds.

Q. From the time you started to struggle with her and you left to go and follow Billie Penland?

A. Yes, sir, that would be about five seconds.

Q. Was Billie Penland there some of the time that you were struggling with her?

A. She was.

Q. And then, I understand, you broke loose and followed Billie Penland?

(Testimony of Edward J. Burns.)

A. That is right, sir.

Q. Now, you caught up, you say, again to Billie [221] Penland in the hallway? A. Yes, sir.

Q. Did you see "Speed" Warren again at any time after you had seen her at the bedroom?

A. After I reached in the hallway, when I secured Miss Penland, that is, I held her by the arm and after I had heard the pounding sounds on the doorway and Captain Caminos' voice saying, "Open up, police officers", then I turned to the front door, "Speed" was already there.

Q. Do you know how she got to the hallway from the bedroom? A. No, sir.

Q. Did you see her at any time crossing the room? A. No, sir.

Q. I understand you just saw her at the bedroom and later on saw her at the hallway when you turned around for Billie Penland, is that correct?

A. That is correct, sir.

Q. What happened while the three of you were there in the hallway? Will you tell us what happened from that point on, if anything?

A. Yes, after I secured Miss Penland and I heard the pounding sounds on the door, heard Captain Caminos' voice, "Open up "Speed", police officers", I turned to the front doorway. "Speed" Warren was standing at the doorway on my left-hand with her back towards me, her left arm was reaching inside the doorway leading upstairs with her hand behind the casing, so that I could not see it.

(Testimony of Edward J. Burns.)

She gave a downward motion of that hand, [222] resembling someone pulling a light cord. I then reached for her to pull her away from the door to open the door. She grabbed hold of my arm. In the mix-up Billie Penland got away. I turned around—before turning around I told "Speed" Warren that I was a police officer; that she was under arrest for assault and battery in this case. I turned around to see where Miss Penland had gone and I believe I saw her running—I saw her running up the back stairs. I turned around again to open up the front door and "Speed" was at the front door, trying to lock it. I pulled her away from the front door and opened it about six inches. Captain Caminos was the first one to come in the doorway.

Q. At the time that the door opened who was closer to the front door, you or "Speed"?

A. We were both about the same distance from the front door, sir.

Q. Who was the closest to the door leading up on the righthand going up the stairs?

A. At the time I opened the front door I was.

Q. Here's the front door here (indicating); who was closest to this stairway at the time the front door opened? A. I was.

Q. You were? A. Yes, sir.

Q. What did you do after the door, just right after the door opened? A. Stepped back, sir.

Q. Stepped back which way? [223]

A. Towards the back stairway.

(Testimony of Edward J. Burns.)

Q. Will you just indicate on the map where you stepped?

A. When I opened the front door, I was standing just about here (indicating), in the middle of the doorway; of course, a little bit back (indicating on Ex. "K") I shoved it a little bit, opened it about six inches. "Speed" was standing about here (indicating). I stepped back from the front doorway. "Speed" crossed over to this side (indicating on Ex. "K") and Captain Caminos came to the door.

Q. Will you please place an "X" where you saw "Speed" Warren's hands in this pulling motion that you have stated?

A. (Marking "X" on Ex. "K") Here, sir.

Q. I understand that was before the door opened? A. That is right, sir.

Q. Just when she was at that position, where were you?

A. I was about here, sir (indicating on Ex. "K".)

Q. And where was Billie Penland?

A. About here (indicating on Ex. "K".)

Q. And "Speed" was over near here (indicating)?

A. She was standing about here (indicating on Ex. "K").

Mr. Dwight: Better mark that.

Mr. Young: Does your Honor mind if we just use this door? (indicating the door back of the Court.)

(Testimony of Edward J. Burns.)

Mr. Dwight: For what?

Mr. Young: Just to illustrate the way she had her hand behind the door. [224]

Mr. Dwight: I am going to object. I don't think they should come in here and renig. He testified twice and both times it is different. I object.

The Court: The Court will overrule the objection and allow the witness to demonstrate with this door.

Mr. Dwight: May I save an exception?

By Mr. Young:

Q. Assume, Mr. Burns, that is the door going up and a hallway on the righthand side (referring to same door.) Will you just illustrate the way you saw "Speed" Warren open the door?

A. (The witness leaves *witness and* is at door back of the Court.) This would be the front door (indicating); this would be the stairway (indicating).

The Court: Open that door.

Mr. Young: (To the Clerk) Mr. Wilder, hold that open temporarily. (Mr. Wilder complies.)

Q. You just take the position that "Speed" Warren was in when you saw her do this?

A. (Demonstrating) She was standing; this would be the front door (indicating); this would be the stairway leading upstairs (indicating); she was standing like this, peering out the glass in the front door, her left arm was up like this (demonstrating a position, reaching with lefthand towards the upper outside of door panel.)

(Testimony of Edward J. Burns.)

Mr. Dwight: Come out and show your arm so the jury can see the position.

A. Out like that (demonstrating). [225]

By Mr. Young:

Q. Did you see her hand? A. No, sir.

Q. How much of her arm did you see?

A. I would say a little bit, from the wrist, sir.

Q. So you just saw it inside the sill, like you have it there? A. Yes.

Mr. Young: That is all.

Cross Examination

By Mr. Dwight:

Q. May I cross examine on that point while he is there to save the trouble of coming back—you coming back again? Mr. Burns, will you demonstrate just exactly what you saw? How was Mrs. Warren's arm when you saw her?

A. Like this (demonstrating.)

Q. She was peering out of the door?

A. That is right, sir.

Q. What was this pulling of a string that you demonstrated? A. It was a downward motion.

Q. Demonstrate to the jury.

A. If the jury was in my place, she would be standing like this (demonstrating.) They would see her arm come down something like that (demonstrating).

Mr. Dwight: That is all.

(The witness resumes the witness stand.) [226]

(Testimony of Edward J. Burns.)

Direct Examination

(Continued)

By Mr. Young:

Q. Now, to your best recollection, Mr. Burns, how long did this struggling take place in the hall from the time you entered there until the front door opened, your best recollection?

A. From the time I entered the hallway until I opened the front door.

Q. When you came back here (indicating on Ex. "K") and the front door opened, about how long a time transpired?

A. That would have been somewhere around ten seconds, sir.

Q. About ten seconds. Now, Mr. Burns, why did you blow your whistle in the bedroom?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial.

Mr. Young: It is very competent, Your Honor. I submit the question.

Mr. Dwight: I submit it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Dwight: Exception.

A. I blew the whistle—I blew the whistle in the bedroom because that was a prearranged signal between Captain Caminos and his men and myself; that they were then to raid the house.

Q. Was anything happening in your presence?

(Testimony of Edward J. Burns.)

Mr. Dwight: I move to strike that answer as incompetent, irrelevant and immaterial, as prejudicial to the defendant and as incompetent [227] upon the ground that no valid arrest had been made and no felony had been committed according to the evidence of this witness.

Mr. Young: I don't know. If counsel will give me an opportunity to find out why he blew it——

The Court: Objection will be overruled at this time.

Mr. Dwight: Exception.

By Mr. Young:

Q. What was happening in that room that caused you to blow it? That is what I meant by the question.

Mr. Dwight: Objected to as already asked and answered. He has already told the jury why he blew the whistle.

Mr. Young: If Your Honor desires a reason for this question, I will make my offer of proof out of the presence of the jury.

(The jury retired from the court-room.)

Mr. Young: I offer to prove by this witness, if he is allowed to answer the question, that at the time he blew the whistle an act of prostitution was about to be committed; that every preparation had been made and the act was about to the completed. In other words, there was an attempt to commit the crime and it was because of that that he blew

his whistle, in his own mind having an idea that he was going to place her under arrest. This will be very material as to whether the other officers had a right to go on the [228] premises, as to whether they had reasonable grounds in order to assist this officer in making an arrest. We have a right by this evidence to show the frame of mind of this officer and the grounds upon which the other officers acted in making their entry.

Mr. Dwight: I object to that as incompetent, irrelevant and immaterial; upon the ground that the evidence affirmatively shows that the witness—I mean the person in the room had been placed under arrest for investigation and that this is a misdemeanor and that the hearsay evidence, evidence of information, evidence of planning, evidence of general reputation is hearsay and is not a fact which would warrant any officer in entering a house for the purpose of making an arrest on the theory that the crime was committed in their presence. I have two authorities here, if the Court wants to read them, one from the Ninth Circuit Court of Appeals and one from the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals case involved a situation like this. The police had absolute general information that this house was a place of bootlegging. They left the police station for the purpose of raiding. They went down, surrounded the place and sent a man in under a plan by which, if he made the buy, he was

to throw his hat out of the door. He made the buy, threw his hat out of the door. The police officers [229] rushed in. That is illegal.

Mr. Young: As long as it is in the evidence that he placed her under arrest and blew his whistle; that he blew his whistle before he placed her under arrest, I want to know why he blew his whistle.

The Court: The question whether the officers on your authority were trespassers or had reasonable grounds to go in will come up later.

Mr. Dwight: I know that any evidence—to begin with, what his opinion was——

The Court: It is not his opinion but what was in his mind.

Mr. Dwight: That is a conclusion. It is for the jury to determine whether or not under the law there are sufficient facts and for the Court to determine from his own——

The Court: The Court will overrule your objection. Objection overruled.

Mr. Dwight: May I save an exception to that question?

The Court: Exception may be noted.

Mr. Young: Read the last question.

Mr. Dwight: And I cite further authority on the recent Corum decision for the purpose of making my objection at this time.

(The jury returned to the court-room and jury-box.)

(Testimony of Edward J. Burns.)

(The reporter read as follows:)

> "Q. What was happening in that room that caused [230] you to blow it? That is what I meant by the question."

A. An offense had been committed in that room in my presence, the offense of attempted prostitution.

Q. And that is the reason you blew your whistle?

A. That is right, sir.

Q. Do you know this girl Billie Penland, if you saw her again? A. Yes, sir.

Mr. Young: Call Billie Penland in for identification.

(The bailiff responded by bringing a woman into the court-room.)

By Mr. Young:

Q. Do you know this lady (indicating the same person)?

A. That is Billie Penland.

Mr. Young: (To the same person) What is your name? A. Billie Penland.

Mr. Young: Let the record show the identification.

The Court: The record may so show.

Mr. Young: Call Marjorie Scott, please. Call Marjorie Scott in here.

(The bailiff responded by bringing a woman into the court-room.)

(Testimony of Edward J. Burns.)

By Mr. Young:

Q. You see this girl here (indicating the same person)? A. Yes, sir.

Q. Do you know who she is?

A. That is Marjorie Scott.

Q. That is the person that you named in your evidence? [231] A. Yes.

Mr. Young: (To the same person) What is your name? A. Marjorie Scott.

Mr. Young: Let the record show the identification.

The Court: Let the record so show.

By Mr. Young:

Q. Can you give us your best estimation of the time it was altogether from the time you first blew your whistle until the front door opened?

A. You mean the time that elapsed, sir?

Q. Yes, approximately.

A. Approximately half a minute, sir.

Mr. Young: Approximately half a minute. Will the Court excuse me to check my minutes?

Q. Did you touch any switch at any time while you were in the hallway? A. No, sir.

Mr. Dwight: Objected to as leading.

The Court: Objection sustained.

Mr. Dwight: I ask that the answer be stricken and the jury instructed to disregard it.

The Court: Has he answered it? The jury is instructed to disregard it.

(Testimony of Edward J. Burns.)

By Mr. Young:

Q. Mr. Burns, while you were in the hallway, did you touch anything in the hallway other than Billie Penland and "Speed" Warren?

A. I touched the front door.

Q. You touched the front door. Anything else?

[232]

A. I believe that is all, sir.

Q. I will ask you whether or not you at any time put your hand into the hallway there where you saw "Speed" Warren put her hand?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial; upon the further ground that the question is leading.

Mr. Young: It is leading. I want to call the witness' attention to the fact somehow—submit it, your Honor.

The Court: The Court will sustain the objection to the form of the question. If you will ask him if he at any time went into that entrance where the stairway was and not limit it to his hand.

By Mr. Young:

Q. Mr. Burns, did you at any time go up those stairs on the righthand side?

A. Not from the time of my first entry to my leaving the place with Captain Caminos afterwards with "Speed" Warren, nor did I touch any--touch the switch that was placed up near the place at the beginning of the stairway, at the foot.

Mr. Dwight: Q. You say you didn't?

(Testimony of Edward J. Burns.)

A. At no time. I didn't know that it was there, sir.

Mr. Dwight: I am going to move to strike that answer on the ground that it was suggested by the last leading question, incompetent, irrelevant and immaterial and leading for that reason.

The Court: The court will overrule the [233] objection.

Mr. Dwight: Save an exception.

The Court: Exception may be noted.

Mr. Young: Your witness.

Cross Examination
(Continued)

By Mr. Dwight:

Q. Mr. Burns, how long have you been a police officer?

A. About a year and three months.

Q. And were you—How long have you been a foot patrolman?

A. I was a foot patrolman. I am still a foot patrolman.

Q. You mean you were commissioned a foot patrolman? A. That is right.

Q. Were you assigned to any duties, commonly called "stool-pigeoning"?

A. No, not when I first came in. I was assigned immediately.

Q. When did you start to be a "stool-pigeon", as we term it? A. I never did.

(Testimony of Edward J. Burns.)

Q. You were never sent in to do under-cover work in cases?

A. I was detailed specially by Captain Caminos.

Q. That was the only time?

A. There was one time previously. I do not recall the date.

Q. Now, Mr. Burns, before you became a police officer, what was your occupation? [234]

A. I was a truck driver at the Express Agency.

Q. How long did you work there?

A. About two years.

Q. Before that what was your occupation?

A. I worked for the City and County for a short period.

Q. What Department?

A. Building Inspector's Department, and prior to that I worked at Honolulu Dairymen's Association as a driver-salesman.

Q. Prior to that?

A. Prior to that I worked as a stevedore for Matson Navigation, as a clerk at the piers for Matson Navigation Company and Dollar Steamship Company; worked at Hawaiian Pines during several summer seasons.

Q. Did you go to school here? A. Yes.

Q. Born here?

A. Born in the States but I was raised here.

Q. Now, Mr. Burns, did you know Miss Penland before you went to the Warren house?

A. No.

(Testimony of Edward J. Burns.)

Q. How did you know her name was Penland?

A. I was informed afterwards.

Q. So you didn't know who she was when you went in there? A. No.

Q. When were you informed her name was Penland?

A. I believe Detective Quinn told me that when I was making out my report. [235]

Q. When you testified on direct examination Miss Penland came down——

A. Quinn subsequently told me it was Penland. She was later identified and called herself Penland.

Q. Quinn told you? A. Yes.

Q. Who assigned you to this duty?

A. Captain Mookini.

Q. Captain Mookini? A. That is right.

Q. And he assigned you to Captain Caminos?

A. Yes, but that was indirectly.

Q. Who told you to leave Honolulu and go out and raid "Speed" Warren's?

A. Captain Caminos.

Q. Captain Caminos. What did he tell you, to raid the place?

A. He told me to go along; he wanted to get evidence of prostitution; they were running a house of prostitution.

Q. That was your instruction, to go along and get the evidence? A. That is right.

Q. That was all the instruction he gave you?

(Testimony of Edward J. Burns.)

A. He told me if I could get in the room with a girl and she was undressed and I was undressed the evidence would be more conclusive.

Q. You went in and got undressed?

A. Yes.

Q. Did you intend to have intercourse with that girl that night? [236] A. No.

Q. Never intended to do it?

A. I did not.

Q. When you walked in there you had no idea of committing fornication?

A. It would have been adultery. I am married.

Q. You never intended to do it?

A. No.

Q. You never had any idea of doing anything which would be considered evidence of prostitution?

A. Not of committing the actual act.

Q. Not of committing the actual act? And you didn't commit the actual act? A. No.

Q. And you blew your whistle when you knew that no act of prostitution had been committed?

A. There was an attempt at it.

Q. You meant to compel her to commit prostitution? A. By both of us.

Q. By both of you. You considered that an attempt? A. Yes, sir.

Q. So you blew your whistle?

A. That is right.

(Testimony of Edward J. Burns.)

Q. You had her arrested?

A. I arrested her.

Q. And you were naked at the time?

A. I was.

Q. You say you reached over and picked up a handkerchief, as I remember it?

A. I reached in the inner breast pocket of my coat [237] that was lying on the bureau and picked up my handkerchief.

Q. Where was the badge, inside the handkerchief? A. That is right.

Q. Where was the whistle, inside the handkerchief? A. Yes.

Q. You blew the whistle with the handkerchief up?

A. No, sir, I took the handkerchief away.

Q. Now, Mr. Burns, you say you left the policemen, the other officers somewhere along here (indicating on Ex. "A".) You indicated somewhere along here (indicating.) Where did you leave them?

A. Down on Kuahiwi Avenue where the railroad tracks start.

Q. Here (indicating on Ex. "A".)?

A. That is right.

Q. Here is where you left the police officers?

A. That is right.

Q. You went up and went along here (indicating) and came to the door and knocked at the door?

(Testimony of Edward J. Burns.)

A. I didn't go up the railroad track; I went up Neal Avenue.

Q. You went up Neal Avenue and you knocked?

A. Yes, sir.

Q. Nobody answered? A. No, sir.

Q. You walked around the house?

A. I walked to the road and walked to the side of the house to see if there was another entrance.

Q. Then you came back to the house again and knocked? [238] A. That is right.

Q. So you went there twice and knocked?

A. That is right.

Q. You recall testifying in this same matter a few days ago on the Motion to Suppress?

A. Yes, I testified.

Q. You remember testifying that you went up to the door and knocked and you were admitted by a woman whom you did not know?

A. Yes, I testified to that.

Q. You never testified about the two times you went there?

A. At the time that Prosecutor Cassidy asked me to relate the circumstances he said to do so briefly. I didn't believe it was necessary at the time.

Q. You did not believe it was necessary. Well, you recall Mr. Cassidy asking you this question: (Reading) "Question: You all went to 'Speed' Warren's place?" You remember that question?

(Testimony of Edward J. Burns.)

A. He may have asked something like that. I don't recall the exact question.

Q. Your answer was: (Reading) "We all went there, not all together"?

A. I went there by myself.

Q. (Reading) "You were assigned to go in?"; the answer was "Yes"? A. Yes.

Q. (Reading) "When you got there, tell us briefly what you did from the time you got there." You remember that question? [239]

A. Something like that, yes.

Q. (Reading) "I went to the door of her house and knocked there and was admitted by a woman named Florence Penland".

A. That is right.

Q. That is right. You never testified about your first visit, that you knocked and nobody answered and that you went around to the side of the house and then came back?

A. No, I didn't.

Q. Now, you didn't think that was necessary, in your opinion, to tell all the facts?

A. At the time he asked me to give him the events brefly; I didn't believe it was necessary.

Q. So you went into the house?

A. I was admitted into the house.

Q. And the only woman you saw was this Penland woman? A. That is right.

Q. You walked through into a room?

(Testimony of Edward J. Burns.)

A. Walked through the living room into that back bedroom.

Q. You started to take off your clothes?

A. That is right.

Q. You stripped down until naked?

A. At the time, yes.

Q. And she was sitting there on the bed, as I remember your testimony?

A. That was after she had gone out twice.

Q. You testified she went out twice?

A. That is right. [240]

Q. Somebody spoke to her from one door; somebody spoke, she went out with wash basin, then somebody came, then she went to the back door of the room and had a conversation with somebody; she stepped out of the room, she came in again; somebody came to the front door of the room and a few words were passed?

A. Then she took off her robe and I arrested her.

Q. What did you arrest her for?

A. For attempted prostitution, sir.

Q. What did you arrest her for?

A. You mean what did I say?

Q. Yes.

A. I stated I was a police officer; I was placing her under arrest for investigation.

Q. You told her you were placing her under arrest for investigation? A. Yes.

(Testimony of Edward J. Burns.)

Q. Not you were placing her under arrest for attempted prostitution?

A. That is right.

Q. Whom did you talk to between January 29th and the time that you took the stand today about what you were arresting her for? Whom did you discuss the case with?

A. I discussed the case with Mr. Young. That fact was not mentioned.

Q. That fact was not mentioned? A. No.

Q. Can you give any reason for switching your testimony that you placed her under arrest for investigation and the other one was because she attempted to commit [241] prostitution?

Mr. Young: I object to this as a misstatement of the evidence.

By Mr. Dwight:

Q. You are talking about what was in your mind?

A. That is just what I was going to tell you.

Q. It was in your mind to arrest her for attempted prostitution? A. That is right.

Q. You told her she was arrested for investigation? A. That is right.

Q. You told her nothing else?

A. That is right.

Q. You had to pass an examination to be a police officer? A. Yes.

Q. You ever read the law on the arrest and how to make the arrest? A. Yes.

Q. And that is your answer? A. Yes.

(Testimony of Edward J. Burns.)

Q. And you passed the examination?

A. Yes.

The Court: The Court will take a short recess. It is ten after ten.

(A brief recess was taken.)

(The last question and answer were read.)

By Mr. Dwight:

Q. Now, after you blew your whistle, Mr. Burns, you said Marjorie Scott came to the door? [242]

A. Came to the front door of the bedroom.

Q. Who told you her name was Marjorie Scott?

A. I was informed later on and I also had seen her before; in fact, I had a little case with her, but the name was different.

Q. Well, when were you informed her name was Marjorie Scott? Was it yesterday when you talked to Mr. Young?

A. No, sir, sometime prior to making my report on the 4th I asked Detective Quinn what her name was.

Q. You were informed sometime before making your report? You are sure of that? A. Yes.

Q. It wasn't subsequent to January 29, 1938, that her name was Marjorie Scott? A. No.

Q. Do you recall testifying in this court on January 29th? A. Yes.

Q. Do you recall testifying that after you blew your whistle——

Mr. Dwight: May I have just a moment, your Honor?

(Testimony of Edward J. Burns.)

The Court: Certainly.

Mr. Dwight: I withdraw that question for the time being. (Examining transcript.)

Q. Do you recall testifying before this Court that a woman came to the door, whose name you didn't know? A. I don't.

Q. You don't recall testifying to that?

A. No. [243]

Q. The woman that came to the front door?

A. I don't recall testifying.

The Court: The front door of the bedroom?

Mr. Dwight: The front door of the bedroom.

A. I don't recall testifying to the fact that I didn't know her name.

By Mr. Dwight:

Q. Now, you also testified on direct examination that there were two men in the parlor downstairs; one man's name was Erpelding. You recall testifying to that?

A. His name was Erpelding.

Q. Well, Erpelding, you testified about Erpelding on January 29th?

A. I don't recall if I testified.

Q. You remember testifying that there were some soldiers there? You didn't know their names.

A. I testified there were two men that I didn't know.

Q. You didn't know?

A. I may have testified to Mr. Erpelding's name. He was there after I left the room.

(Testimony of Edward J. Burns.)

Q. You have a definite recollection of giving Mr. Erpelding's name? A. No, I don't.

Q. That was on January 29th, a couple of weeks ago?

A. I don't recollect whether I gave his name or not.

Q. When Marjorie Scott came to the front door, Mr. Burns, what did she do, just look in or say something?

A. The front door of the bedroom?

Q. Yes, I am talking about Marjorie Scott, the one [244] you called Marjorie Scott.

A. After the whistle was blown?

Q. At any time.

A. When she came to the front door after the whistle was blown she just looked in.

Q. She just looked in; you did not place her under arrest?

A. Yes, I stated I believe I did and it was stricken.

Q. Did you or did you not place her under arrest? A. I cannot state definitely, sir.

Q. You say she came and looked in the door and left? A. That is right.

Q. You don't recall whether you placed her under arrest or not? A. That is right.

Q. Then you say Mrs. Warren came in the back door of the bedroom? A. Yes, sir.

Q. And that was sometime after Marjorie Scott looked in the front door of the bedroom?

(Testimony of Edward J. Burns.)

A. Probably a little more than five seconds.

Q. What did Mrs. Warren say to you right off the bat when she came in?

A. "What is the big idea of breaking into a respectable house this way?"

Q. That was her first statement to you?

A. Yes.

Q. Did she request that you get out of her house?

A. I don't recall her saying that.

Q. You deny that she told you to get out? [245]

A. I do.

Q. That is all you recall her saying, "What do you mean by coming and breaking into a respectable house?"

A. She said other sentences to that effect also.

Q. What was that answer?

A. She said other sentences or phrases to that effect also, "The idea of breaking in here"; something like that, sir.

Q. Now, you don't recall whether Mrs. Warren saw your badge or not?

A. I stated that I did not show it to her.

Q. You stated you did not show it to her?

A. That is right.

Q. You put it on a dresser, I think you testified on direct examination?

A. Top of the dresser.

Q. Then she told you—Then you folks got into a fight, you and Mrs. Warren?

(Testimony of Edward J. Burns.)

A. It was not a fight, a scuffle.

Q. A scuffle. Who hit first?

A. There was no hitting done.

Q. No hitting. What did you do in this scuffle?

A. She grabbed hold of my arms when I attempted to hold Billie Penland from running out of the room.

Q. When she grabbed hold of your arms, did she tell you to get out of the house?

A. No, sir.

Q. She did not? A. No.

Q. The three of you were fighting in this room? [246]

A. Billie Penland wasn't in the scuffle.

Q. She was not in the scuffle. Were you holding onto Billie Penland?

A. I grabbed hold of her once and shoved her back on the bed.

Q. When was that?

A. When she got off the bed and attempted to run out of the room and after "Speed" told her to get out the room.

Q. And then you and "Speed" were hanging on to each other?

A. She grabbed hold of my arms so I pushed loose. Billie Penland ran out of the front door. I twisted my arms loose from "Speed" and chased after the girl.

Q. You were directly back of Billie Penland; as soon as Billie Penland went out of that front

(Testimony of Edward J. Burns.)

door of the bedroom and started out, you could see her?

A. Why, yes, I saw her running; she was in the middle of the room.

Q. You went across this room (indicating on Ex. "K"), when you got to point that you indicated along here, indicating a point after coming out of this door, you caught up to Billie Penland?

A. That is right.

Q. Did you run? A. Yes, I chased her.

Q. You chased her and when you got out here (indicating on Ex. "K"), you testified on direct examination that Mrs. Warren was peering out of the front door?

A. No, sir, I did not testify to that. [247]

Q. Then what did you testify to?

A. I testified to the fact that after I grabbed hold of Miss Penland she struggled a little. Naturally I had to grab probably two or three times before I got a good hold on her. I heard those pounding sounds and Captain Caminos saying, "Open up", then I turned to the front door. I saw "Speed" was already there.

Q. You don't know how she got there?

A. No.

Q. You never saw her coming out of the room?

A. No.

Q. You feel anybody pounding on you, trying to throw you out of the back door? A. No.

(Testimony of Edward J. Burns.)

Q. Did anybody tell you to get some clothes on? You didn't hear those words? A. No.

Q. Well, now, when you say you struggled a little with Billie Penland, you demonstrate just what you did. You grabbed her, you caught up to her and then you grabbed her?

A. That is right.

Q. She stopped right away?

A. She tried to get away.

Q. She tried to get away, then you got a good hold on her? A. Yes.

Q. As far as that incident is concerned, you had Billie Penland? A. Yes. [248]

Q. How long did that take, when you grabbed Billie Penland and you held her firmly?

A. Perhaps two seconds.

Q. You two were scuffling right out here, right there where you indicated at that cross (indicating on Ex. "K".)? A. Yes.

Q. Then you glanced to the front door and saw "Speed" peering out about that time?

A. Yes, sir.

Q. Did "Speed" say anything to you at that time or you to her?

A. She may have said something but I did not say anything until I told her she was under arrest for assault and battery.

Q. When did you tell her she was under arrest for assault and battery?

(Testimony of Edward J. Burns.)

A. After she turned towards me, grabbed hold of my arms and clawed at me.

Q. You mean assault and battery upon a police officer? A. That is right.

Q. Prior to that time you don't recall her telling you to get out of the house?

A. She didn't.

Q. She didn't. You do remember her telling you, "What do you mean by breaking into my house, a respectable place?"

A. She said that.

Q. It was after that you told her you placed her under arrest for assault on a police officer?

A. That is right. [249]

Q. Do I understand your testimony to be that after you had a firm hold on Miss Penland out there in front and you peered—you looked out toward the door and saw Mrs. Warren peering out?

A. Yes.

Q. You grabbed her after that?

A. Yes.

Q. What did you grab her for?

A. To pull her away from the door.

Q. What did you pull her away from the door for? A. To open the door.

Q. Did she tell you that she would open the door? A. No.

Q. Did she tell you then to go get some clothes on? A. Oh, no.

Q. You deny that? A. Yes.

(Testimony of Edward J. Burns.)

Q. And for no reason at all, because you wanted to open the door, you grabbed hold of Mrs. Warren and pulled her aside?

A. I didn't. I succeeded in pulling her aside that time.

Q. You reached for her and grabbed her?

A. That is right.

Q. And she turned around and struck you?

A. She didn't strike me.

Q. She clawed at you?

A. That is right.

Q. Then you arrested her, told her she was under arrest for assault and battery on a police officer? [250] A. That is right.

Q. For what offense were you charging her with assault and battery on a police officer, for the assault inside or the assault outside by the door?

A. The assault outside by the door.

Q. That assault came after you struck her?

A. I did not strike her.

Q. You pulled her and tried to drag her away?

A. I didn't drag her.

Q. Well, pulled her? A. That is right.

Q. Then you say Miss Penland disappeared?

A. She didn't disappear. I saw her at the back stairway when I turned around.

Q. You saw her at the back stairway when you turned around? A. Yes.

Q. You never bothered about chasing after her?

A. No.

(Testimony of Edward J. Burns.)

Q. You were so anxious to open the door and let the police officers in to carry out your plan?

A. That is right.

Q. Did you open the door or did you not open the door? A. I opened the door.

Q. Definitely, you are sure of it?

A. Yes.

Q. Are you positive? A. Positive.

Q. You opened the door and Caminos came in?

A. Yes. [251]

Q. This morning you testified about stepping back.

A. I didn't step back to let her do that.

Q. What did you step back for?

A. To let Caminos in.

Q. To let Caminos see you?

A. To let Caminos in.

Q. You say Mrs. Warren stepped up to the door?

A. She crossed over to the side, to the lefthand side of the door as we were facing it.

Q. In other words, you want this jury to understand by your testimony when you got here (indicating on Ex. "K"), fighting with Miss Penland, after you had pushed Mrs. Warren aside in this bedroom, when you ran out here and caught Miss Penland here (indicating on Ex. "K") and grabbed hold of her and then looked toward the door, you saw Mrs. Warren standing inside the door? A. Standing there, yes.

(Testimony of Edward J. Burns.)

Q. With her lefthand up something like that (demonstrating)?

A. Not quite so high.

Q. Like that (demonstrating)?

A. A little lower.

Q. About like that (demonstrating)?

A. Something like that.

Q. Then you said she was pulling a string or something? A. I didn't say she was.

Q. A pulling motion?

A. A pulling motion, yes.

Q. Then you also want the jury to understand that [252] you reached for the door?

A. Not immediately. I wanted to get at the door.

Q. You wanted to get at the door. Then after you finally got at the door or while you were facing there at the door, Mrs. Warren had moved over to this side (indicating on Ex. "K") and you had gotten over to that side (indicating)?

A. I had pulled her over to that side.

Q. You grabbed the door knob? A. Yes.

Q. You get any electric shock? A. No.

Q. Then you say you stepped aside and let Mrs. Warren step in front again? That is what you said this morning. A. I stepped aside.

Q. Do you recall what you said the other day?

A. I don't believe I went into quite so much detail.

(Testimony of Edward J. Burns.)

Q. I see. Do you recall testifying along this line: (Reading) "I then grabbed"—page 6, middle of the page—"I then grabbed her and attempted to pull her away from the door so that I might open it. She grabbed hold of me and I released Miss Penland to cope with "Speed". "Speed" again turned to the door and I turned around to see where the Penland woman had gone. I believe that she was out of sight, so turned back to "Speed" again, who was again with her back towards me and seemed to be fumbling at a lock or latch on the door." Now, what was she fumbling about?

A. Trying to close the hasp, to lock the hasp that was at the door. There was a little hasp by [253] which you could lock the door from inside with a lock, I believe.

Q. And that was a considerable time, then, after this pounding that you heard?

A. No, not a considerable time.

Q. The first thing that you heard after you rushed out with Miss Penland was pounding on the door, wasn't it?

A. No, I wouldn't say that.

Q. You wouldn't say that. Was it about the time that you got out there with Miss Penland?

A. No, you see, after I had secured Miss Penland, I would say just about as I was to turn to the door I heard the pounding sounds and Captain Caminos say, "Open up, police officers". I can't say whether the pounding sounds came first or

(Testimony of Edward J. Burns.)
whether Captain Caminos' voice came first or whether they came together, just how it was.

Q. I am not talking about that. I am talking about the pounding at the time you got out in the hallway.

A. The pounding, as I heard it, was as I turned toward the front door after I had secured Miss Penland.

Q. You knew the police officers were outside in the street? A. Yes.

Q. Less than twenty-five feet from the front door?

A. I don't know if they were out in the street.

Q. You don't know? A. No.

Q. Didn't you talk it over with them? [254]

A. That part wasn't stated.

Q. Did you talk it over after the incident?

A. I didn't ask them where they had stayed, where they were.

Q. And then after you opened the door, say, six inches—— A. About that.

Q. (Continuing) you immediately stepped back?

A. Yes.

Q. Quickly? A. Yes.

Q. Caminos came right in?

A. He stepped up to the door. He might have entered about the doorway; he didn't come exactly all the way in.

Mr. Young: I ask the witness be allowed to answer.

(Testimony of Edward J. Burns.)

Mr. Dwight: The answer is in the record.

Q. Then you say "Speed" was the one at the door?

A. "Speed" was right in front of the door.

Q. Have you talked to anyone about that phase of your testimony, that particular phase of your testimony? A. Yes.

Q. Who did you talk to, Captain Caminos?

A. No.

Q. Were you told that Captain Caminos testified under oath that "Speed" opened that door?

A. No.

Q. Did anybody inform you that Captain Caminos testified under oath that "Speed" opened that door? A. No. [255]

Q. Nobody told you that? A. No.

Q. Never heard about it? A. No.

Q. Never heard anything about it like that?

A. No.

Q. You recall testifying on the hearing here that you went there and opened the door? You testified along that line, you went up there, grabbed the latch, opened the door and Captain Caminos stepped in; you recall that? A. Yes.

Q. Today you testified that you went up there, opened the door six inches, stepped back so "Speed" could go up there? A. No.

Q. Didn't you testify this morning that you opened the door and you stepped back and that

(Testimony of Edward J. Burns.)
when Caminos came in "Speed" was by the door, closer to the door than you were?

A. We were both about the same distance from the door. She was standing on the lefthand side of the door; I was standing here (indicating on Exhibit "K").

Q. You recall testifying this morning that when Caminos came in Mrs. Warren was on the right, you were on the left? A. I do not.

Mr. Dwight: May we have the record?

The Court: (To the Reporter) Will you refer to that testimony? [256]

Mr. Young: The proper procedure to impeach this witness——

Mr. Dwight: The proper procedure is for me to call the Reporter for the record.

The Court: You are not calling for it now?

Mr. Dwight: I am perfectly willing to pass it for the time being.

The Court: All right pass it for the time being.

(The Reporter later read the excerpt from the record to both counsel in chambers, as quoted on pages 263 and 264 of this Transcript.)

By Mr. Dwight:

Q. When did you first know that the woman was Marjorie Scott? When did you first learn of her name?

A. I don't recall the exact date but I believe I asked Detective Quinn for her name and he gave

(Testimony of Edward J. Burns.)
it to me the next morning while I was writing my report.

Q. Do you recall testifying on the 29th of January if Marjorie Scott ever came in after the whistle was blown?

A. I don't recall whether I testified Marjorie Scott came in after the whistle was blown. I testified to the fact she came to the door after the whistle was blown.

Q. You recall that you did not testify to Marjorie Scott coming in after the whistle was blown?

A. I can state definitely.

Q. Now, you say that you spoke to Mr. Young in connection with that particular phase of the testimony that I have been referring to?

A. Yes. You mean about in the hallway there? [257]

Q. Yes. A. That is right.

Q. When did you talk to him?

A. I don't recall now whether it was before the dismissal or after, or after the case of dismissal.

Q. Was it after you had testified here?

A. I believe so. That is right; it was afterwards.

Q. And in that conversation with Mr. Young was Caminos' testimony discussed?

A. No, sir.

Q. Wasn't discussed? A. No.

(Testimony of Edward J. Burns.)

Q. Mr. Young never said a word to you about Caminos testifying that he said "Speed" opened the door? A. No.

Q. But you do admit that you discussed that particular phase of the testimony with Mr. Young subsequent to January 29th? A. Yes.

Q. Now when you first had your struggle with Mrs. Warren in the bedroom, you say that that lasted for about five seconds?

A. About that.

Q. And in that struggle Miss Penland got away?

A. At the termination, just before the termination of the struggle.

Q. Just before the termination of the struggle. In other words, when Miss Penland went out you threw "Speed" aside?

A. I twisted my arms loose. [258]

Q. You caught up as she entered the alleyway?

A. She entered the hallway already.

Q. When you grabbed her? A. Yes.

Q. Now, when the front door was finally opened, did you get up there and hold your hands up and say, "Boys, I am balls naked"? A. No.

Q. You didn't have any uniform on or anything like that police station uniform? A. No.

Q. You did not have your badge exposed where people could see it?

A. You mean when I entered the house?

Q. Yes. A. No.

(Testimony of Edward J. Burns.)

Q. Or at any time?

A. Not until I put Miss Penland under arrest.

Mr. Dwight: That is all, your Honor, with the exception of further cross-examination, which I will ask the Reporter to check up during the intermission for a recess and I ask that I be permitted to recall this witness for further cross-examination at that time.

The Court: Any redirect at this time?

Mr. Young: Yes.

Redirect Examination

By Mr. Young:

Q. Mr. Burns, will you give us some idea, from your best recollection, the dimensions of this hallway (indicating on Exhibit "K")? [259]

A. (Referring to Ex. "K" and indicating) That was about five feet wide and seven feet long; the length, from the front of the door to the stairway.

Q. What do you call the length? Will you come down here and indicate?

A. (Stepping down and indicating on Ex. "K") Seven feet from the front door to here (indicating) and about five feet to the foot of the stairway and about five feet from the outside wall of the house to this doorway here (indicating).

Q. Indicating the doorway connected to the stairs going up? A. Yes.

Q. Now, approximately what is your best judgment of the distance from this door, the front door

(Testimony of Edward J. Burns.)
of the bedroom that you were in, to the beginning of the hallway, the number of feet?

A. About 18 feet, sir.

Q. About 18 feet. Take the stand. Would you know this fellow Erpelding? If you saw him, would you? A. Yes, sir.

Mr. Young: Call Erpelding.

(The bailiff responds, bringing into the court-room a gentleman.)

Q. You see this man here (indicating the same person)? A. Yes.

Q. Is he one of the men that you saw in the room, in the parlor? A. Yes.

Q. What position was this man in the room when you [260] saw him?

A. He was seated on this chair over here (indicating on Ex. "K").

Q. That is the chair?

Mr. Dwight: Just a moment. I ask the witnesses be excluded while this testimony is going on.

Mr. Young: Withdraw that last question.

The Court: No question will be asked in the presence of the witnesses.

By Mr. Young:

Q. He is the man that you testified to? (Referring to the same person.) A. Yes.

Q. (To the same person) What is your name?

A. Erpelding.

(Testimony of Edward J. Burns.)

Mr. Young: May the record show the identification of Erpelding?

The Court: The record may so show.

By Mr. Young:

Q. You say that man was there at this point (indicating on Ex. "K") when you saw him?

A. Yes, that is right.

Mr. Young: Indicating the front part of the parlor, facing the front door.

The Court: Just wait until after 11 o'clock.

Mr. Dwight: I will take it up then.

Mr. Young: I would just as soon if counsel wishes. May we have our 11 o'clock recess? I would just as soon have counsel continue with his cross examination before I start with another witness.

The Court: The Court will stand in recess. [261]

(A brief recess was taken.)

In Chambers.

(Both counsel being present in chambers, and the defendant also being present, the following proceedings were had and testimony given):

Mr. Dwight: At this time I would like to move for a continuance upon the ground the defendant is ill. She is now suffering with cramps of a serious nature. She doesn't feel she will be able to stick it out for the remainder of the afternoon.

The Court: Will you swear her?

ILENE WARREN,

called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dwight:

Q. Your name is Ilene Warren?

A. Yes, sir.

Q. You are the defendant in this case?

A. Yes.

Q. At the present time you are having your periods, are you not? A. Yes.

Q. Accompanying those periods are you suffering from cramps? A. Yes, sir.

Q. Those cramps are of a rather serious nature?

A. Yes, sir.

Q. You feel that you can't continue sitting in Court for your own health? [262] A. Yes.

Q. You feel it is for your own health that this matter be continued until tomorrow morning?

A. Yes.

Mr. Young: The Territory has no objection.

The Court: Let the record show the Territory has no objection and the Court will continue this case until tomorrow morning at nine o'clock.

(The reporter read as follows from the Direct Examination by Mr. Young of Witness Edward J. Burns):

"Q. What happened while the three of you were there in the hallway? Will you tell us

what happened from that point on, if anything?

A. Yes, after I secured Miss Penland and I heard the pounding sounds on the door, heard Captain Caminos' voice, "Open up, 'Speed', police officers," I turned to the front doorway. 'Speed' Warren was standing at the doorway on my lefthand with her back towards me, her left arm was reaching inside the doorway leading upstairs with her hand behind the casing, so that I could not see it. She gave a downward motion of that hand, resembling someone pulling a light cord. I then reached for her to pull her away from the door to open the door. She grabbed hold of my arm. In the mix-up Billie Penland got away. I turned around—before turning around I told 'Speed' Warren that I was a police officer; that she was under arrest for assault and battery in this case. I turned around to see where Miss Penland had gone and I believe I saw her running —I saw her running up the back stairs. I turned around again to open up the front door and 'Speed' was at the front door, trying to lock it. I [263] *I* pulled her away from the front door and opened it about six inches. Captain Caminos was the first one to come in the doorway.

Q. At the time that the door opened, who was closer to the front door, you or "Speed"?

A. We were both about the same distance from the front door, sir.

Q. Who was the closest to the door leading up on the righthand, going up the stairs?

A. At the time I opened the front door I was.

Q. Here's the front door here (indicating on Ex. "K"); who was closest to this stairway at the time the front door opened?

A. I was."

In Court.

EDWARD J. BURNS,

a witness called on behalf of the defendant, resumed the stand and testified further as follows:

Cross Examination

(Continued)

By Mr. Dwight:

Q. Now, Mr. Burns, the record here indicates from your questions and answers that when you first saw Mrs. Warren she was on the left of the door, then you further testified that you pulled Mrs. Warren away and you went to the door?

The Court: To the left.

By Mr. Dwight:

Q. To the left of the door, then you said you opened the door. Then you testified that when the door was opened Mrs. Warren was on the left. That is what the record shows. [264]

(Testimony of Edward J. Burns.)

A. I testified that I walked back and she walked over to the left.

Q. You stepped back and then she stepped over to the door. In other words, you just stepped back and she crossed over?

A. She was standing on my righthand side and she crossed over.

Q. After the door was opened you say Caminos stepped in? A. Captain Caminos, yes.

Q. And what did he do?

A. He started to talk with "Speed" Warren. I don't know what he said. I went back in the hallway. I intended——

Q. Never mind what you intended. Tell us what you did.

A. I went back in the hallway. I was going to look for Billie Penland.

Q. When you say the hallway, you mean this square in here (indicating on Ex. "K")?

A. That is right.

Q. What did you do?

A. I looked at the back stairs, the stairway. I looked into the parlor.

Q. Did you go into the parlor?

A. I might have looked. I came back in the hallway; "Speed" Warren went up the back stairs; Captain Caminos went out the front door.

Q. You followed Captain Caminos out?

(Testimony of Edward J. Burns.)

A. Not directly. I followed a few seconds later.

Q. Do you recall testifying in that regard on January [265] 29th?

A. I testified somewhat, something similar to that. I don't recall.

Q. With slight defects? A. No, sir.

Q. Let me put it to you. I think this is your testimony, page 6 (reading from Transcript):

> "Captain Caminos entered the hallway and I left the hallway and went into the parlor a few steps, looked up the back stairway, couldn't see the Penland woman, came back into the hallway and followed Captain Caminos outside of the front door."

A. That is right.

Q. That is your testimony and when you followed him out——

A. When I got outside he was holding Wah Choon Lee.

Q. You followed him out and when you got out there Captain Caminos was holding Wah Choon Lee?

A. I stated a few seconds; I followed him a few seconds later.

Q. That is what I am getting to. Have you discussed that phase of your testimony since you testified on January 29th?

A. No, sir, we discussed the whole incident but we never discussed that particularly.

(Testimony of Edward J. Burns.)

Q. In other words, you testified you followed him out and he told you to go back and put some clothes on? A. That is right.

Q. That is what you testified to before?

A. That is right. [266]

Q. When you followed him out and got out there, he was holding someone by the armpits?

A. He was holding Wah Choon.

Q. That was on the premises of Mrs. Warren?

A. That is right.

Mr. Dwight: I think that is all.

Redirect Examination

By Mr. Young:

Q. Officer Burns, there has been some testimony in this regard, whether you were to the right or left. Will you go over to the board again and show what position you took on the stairway at the time she was at the door, facing out?

Mr. Dwight: He can testify if there has been any misunderstanding about what he meant by right and by left.

Mr. Young: Counsel brought this out on cross. I think this witness has a right to show.

The Court: I believe the evidence is clear.

Mr. Young: Counsel went into that.

The Court: The Court will allow the question.

Mr. Dwight: May I save an exception?

The Court: If the prosecution feels he isn't clear, he has a right to on redirect.

(Testimony of Edward J. Burns.)

Mr. Dwight: Any other testimony, I submit, he can't bring in now. It is improper.

By Mr. Young:

Q. When you testified, tell whether it is on the right or left, whatever day it was.

The Court: Just clear up the question. [267]

A. When I chased Billie Penland into the hallway, she first turned towards the front door, then she turned back to this stairway and I caught her just about here (indicating on Ex. "K"). I was standing with my back this way (demonstrating).

The Court: Indicating what?

A. Back this way; the back of my body would be towards this doorway (indicating).

Q. Which doorway?

A. The doorway leading into the living room. She was standing about here on my righthand side and in front of me (indicating on Ex. "K"). After I secured a good hold of her our positions did not change much while I was securing a hold on her. I turned to the front door, the left of my body and my back was here (indicating on Ex. "K"). I turned to the front door in this space (indicating). "Speed" Warren was standing here (indicating).

The Court: You say "here", indicating what?

A. She was standing at the foot of the stairway.

(Testimony of Edward J. Burns.)

By Mr. Young:

Q. Which stairway?

A. Stairway leading from the hallway to a room upstairs, which stairway is next to the front door. She was standing next to that front door, also facing it and looking out.

The Court: To the right or left of the front door?

Mr. Dwight: To the left of the front door.

The Court: To the left of the front door? [268]

A. To the left of the front door, looking out, and I grabbed her; she turned towards me. I was then facing the front door and her back was towards it. When I released my hold on her and she turned towards the door, I turned to this back stairs and I saw Billie Penland go up and I again turned toward the front door. "Speed" Warren's back was again towards me. She was attempting to close the hasp and lock it. She again turned toward me.

Recross Examination

By Mr. Dwight:

Q. About here (indicating on Ex. "K")?

A. About here (indicating on Ex. "K"). I was then standing here (indicating), facing the front door, grabbed the lock, opened it, shoved it outwards. I stepped back a few steps and Mrs. Warren crossed over in front of me to this spot again (indicating).

(Testimony of Edward J. Burns.)

The Court: Indicating the left.

A. On the lefthand side of the front door as we faced it, and Captain Caminos then entered.

By Mr. Dwight:

Q. While you were here you said that Billie Penland started toward the front door?

A. That is right.

Q. Where were you when she started toward the front door?

A. About here (indicating on Ex. "K"), about two or three feet away.

Q. In the parlor? A. Yes.

Q. How far did she go toward the front door?

A. She took a step toward the front door, then hesitated, [269] then turned around with her back toward the front door and then went up the stairs.

Q. When did you first hear of the hasp on that door? A. I saw it.

Q. You saw it, this little hasp? A. Yes.

Q. You don't know where Mrs. Warren came from, but you could still see the hasp out at the front door. You can't tell this jury how Mrs. Warren got to the front door? A. No.

Q. This room is seven by five? (Indicating on Ex. "K"). A. Yes.

Q. And you didn't see her?

A. No, I was engaged with Miss Penland.

Mr. Dwight: No further questions.

The Court: That is all; Officer Burns excused.

[270]

No. 9506

United States
Circuit Court of Appeals
For the Ninth Circuit.

ILENE WARREN alias SPEED WARREN,
Appellant,

vs.

THE TERRITORY OF HAWAII,
Appellee.

Transcript of Record
In Three Volumes

VOLUME II
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United States
Circuit Court of Appeals
For the Ninth Circuit.

ILENE WARREN alias SPEED WARREN,
Appellant,

vs.

THE TERRITORY OF HAWAII,
Appellee.

Transcript of Record
In Three Volumes

VOLUME II
Pages 311 to 646

Upon Appeal from the Supreme Court of the Territory of Hawaii

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

BILLIE FLORENCE PENLAND,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Billie Florence Penland.

Q. Miss Penland, will you speak just a little louder, please, and face in this direction (indicating). We must hear what you say. Where do you live at the present time?

A. 1660 Kapiolani Boulevard.

Q. Who are you living with at that address?

A. My mother.

Q. Do you know a person by the name of Ilene Warren also known as "Speed" Warren?

A. Yes, sir.

Q. How long have you known her?

A. Since the 10th of June last year.

Mr. Dwight: A little bit louder, please.

The Witness: I will try.

Q. Where did you meet her?

A. At the California Hotel.

Q. Were you introduced to her there?

A. Yes, sir.

Q. And that was June? A. June 10th.

Q. Of what year? A. 1937.

Q. 1937? A. Yes, sir. [271]

Q. Is she in the court-room here this morning?

A. Yes, sir.

(Testimony of Billie Florence Penland.)

Q. Where is she?

A. Sitting there (indicating the defendant).

Mr. Young: May the record show the identification?

The Court: Let the record so show.

Q. Do you know where "Speed" Warren lives now?

A. No, I don't; not at the present time.

Q. Did you know where she lived on August 3, 1937? A. Yes, sir.

Q. Where did she live?

A. Out in Wahiawa.

Q. What place in Wahiawa?

A. I don't know the name of the street.

Q. If you saw a picture of that house that she lived in at that time, would you know it?

A. Yes, sir.

Q. Will you please take a look at Prosecution's Exhibits D, E, F and G in evidence and point out, if you can, the house? (Handing exhibits to the witness.)

A. That is it there (indicating).

Q. How about this Prosecution's Exhibit D, that is a picture of the house? (Referring to exhibit.)

A. Yes.

Q. How do you know that is where Mrs. Warren lived on August 3, 1937?

A. Because I was there at that time. [272]

Mr. Dwight: Just a moment. I don't know whether this witness has been advised of her con-

(Testimony of Billie Florence Penland.)

stitutional rights. I have a little chivalry left, about letting a girl stick her neck in the noose. I have a right to call the Court's attention to it. She doesn't have to go in.

The Court: The Court heard your statements. The witness has a constitutional privilege. At any time you don't want to answer a question on the ground it may tend to incriminate you, that is your privilege. You understand that?

The Witness: Yes, sir.

Mr. Young: You understand that.

Q. Now, Miss Penland, did you live in that house? A. Yes, sir.

Q. How long did you live there?

A. 10th of June to 3rd of August.

Q. What year? A. 1937.

Q. You left on the 10th of August?

A. No, I left on the 3rd of August.

Q. You left there on the 3rd of August. What were you doing in the house of Mrs. Warren?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial; the same objections as the other one.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception noted.

(The last question was read.) [273]

A. I was working there.

Q. You were working for Mrs. Warren?

A. Yes, sir.

(Testimony of Billie Florence Penland.)

Q. Was there anyone else living there at that time?

A. There was another girl living there by the name of Marjorie Scott.

Q. Anyone else? A. No, sir.

Q. Do you know Marjorie Scott if you saw her again? A. Yes, sir.

Mr. Young: (To the bailiff) Call Marjorie Scott.

(The bailiff brings a woman into the court-room.)

Mr. Dwight: I will admit that is the same Marjorie Scott the witness has identified as Marjorie Scott.

The Court: Let the record so show.

Q. Now, on August 3rd, the last day that you were there, did anything unusual happen while you were in that house? A. Yes, sir.

Q. Will you please tell this jury just what happened, if you know?

A. Well, we had a raid on the 3rd of August.

Q. What time?

A. That I really can't state. I don't know the exact time.

Q. Was it in the daytime or evening?

A. No, it was in the evening.

Q. Approximately, will you state, to your best recollection, what time it was? [274]

A. It was after 8 o'clock.

Q. What do you know of this whole thing, of your own knowledge, of what happened?

(Testimony of Billie Florence Penland.)

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, unless the question can be made more definite. It is vague.

Mr. Young: Withdraw the question.

Q. Were you working for Mrs. Warren at that time? A. Yes.

Q. There has been some testimony in this case you admitted an Officer Burns? A. Yes.

Q. Do you know him? A. Yes.

Q. Now, Miss Penland, do you know an officer by the name of Burns? A. Yes, sir.

Q. Will you state whether or not on August 3, 1937, you saw Mr. Burns at Mrs. Warren's place?

A. Yes, sir.

Q. Will you please tell the jury the circumstances that you first saw him there, how you happened to first see him?

A. Well, I had to let him in the door.

Q. Where were you when he was at the door?

A. I was upstairs and Mrs. Warren told me to go downstairs and let him in.

Q. Who was upstairs when you were upstairs?

A. Sergeant Odle and Mrs. Warren.

Q. Sergeant Odle and Mrs. Warren?

A. Yes, sir. [275]

Q. Would you know Sergeant Odle, if you saw him again? A. Yes, sir.

Mr. Young: (To the bailiff) Call Sergeant Odle, please.

(Testimony of Billie Florence Penland.)

(The bailiff brings a man into the court-room).

Q. Take a look at this gentleman and tell me whether or not this is the man that you saw upstairs?

A. (After looking at the man) Yes, sir.

Mr. Young: What is your name?

A. (By the man identified) Sergeant Odle.

Mr. Young: May the record show the identification of Sergeant Odle.

The Court: The record may so show.

Mr. Dwight: Now, if the Court please, I move to strike this answer as incompetent, irrelevant and immaterial for any purpose whatsoever, having no bearing on the issues here. She testified she permitted Officer Burns to come in downstairs. It is immaterial who was upstairs.

The Court: Objection overruled.

Mr. Dwight. Save an exception.

The Court: Exception noted. Proceed with the direct examination.

Q. You were upstairs and "Speed" Warren was up there and Sergeant Odle, is that correct?

A. Yes, sir.

Q. Was anyone else up there?

A. No, sir.

Q. How did you know there was someone at the front door? [276]

A. There was a knock at the front door and Mrs. Warren looked out the window.

(Testimony of Billie Florence Penland.)

Q. What window did she look out? Can you show us in the documents there? (Referring to papers in the hands of witness)

A. The window right above that garage (indicating on paper).

The Court: What exhibit?

Mr. Young: Exhibit D.

Q. What did she say to you, if anything?

A. "Go downstairs and let him in." She said it was O. K.

Q. You let him in? A. Yes.

Q. What did you, if anything, after that?

A. I said hello to him.

Mr. Dwight: Now, may it please the Court, may I have my objection to this.

The Court: Miss Penland, you are instructed not to relate any conversation on your part not in the presence of Mrs. Warren.

Q. Just tell what you did.

A. I opened the door and let Mr. Burns in.

Q. And did you go any place?

A. Yes, we went to the reception room.

Q. You went to the reception room. Any place else? A. Yes.

Q. Where else did you go?

A. Into another room.

Q. What room is that? How would you describe that [277] room?

A. Well, going in, it would be on the righthand side.

(Testimony of Billie Florence Penland.)

Q. Well, what is it, the kitchen, a living-room or what? A. No, it is a bedroom.

Mr. Young: Bedroom. May this exhibit be received in evidence? It is marked for identification.

Mr. Dwight: May I have my general objection and exception on the same grounds heretofore?

The Court: Exhibit K for identification will be received in evidence and marked "Exhibit K" in evidence. Exception noted.

(The paper referred to, having previously been marked "Plaintiff's exhibit K for identification," was received in evidence and marked "Plaintiff's exhibit K.")

Q. You went into this room with Officer Burns, this bedroom? A. Yes.

Q. And after you got into the room, what did he do, if anything?

The Witness: Must I answer that question?

Mr. Young: You want to claim your privilege? Is that what I understand? You don't care to answer that question?

The Witness: No, sir.

Mr. Young: On the ground of your constitutional rights, is that correct?

The Witness: Yes, sir.

Q. Well, how long did you stay in the room? [278]

A. That I can't say exactly.

Q. Did you leave the room? A. Yes.

(Testimony of Billie Florence Penland.)

Q. And why did you leave the room?

The Witness: I refuse to answer.

Mr. Young: If you don't care to answer this question, just so state. You refuse to answer that question on your constitutional rights?

The Witness: Yes, sir.

Q. You did leave the room? A. Yes, sir.

Q. While you were in the room did you see "Speed" Warren at any time? A. Yes, sir.

Q. You recall whether or not you heard anything unusual while you were in the room?

A. Yes, sir.

Q. What did you hear? A. A noise.

Q. What kind of a noise?

A. Banging on the door.

Q. Banging on the door. Did you hear anything else? A. No, sir.

Q. Did you hear the officer make any kind of a noise? A. Yes, sir.

Mr. Dwight: Just a moment. Objected to as leading.

Mr. Young: I submit it. [279]

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception noted.

Q. What kind of a noise was that?

A. Police whistle.

Q. Now, before this police whistle blew, had anyone else come into the room?

A. No, sir.

(Testimony of Billie Florence Penland.)

Q. After the whistle blew did anyone else come into the room? A. Yes, sir.

Q. Will you please tell us who came into the room? A. Mrs. Warren.

Q. And through which door did she come?

A. Through the rear.

Mr. Young: Beg pardon?

A. Rear door.

Q. Rear door. And what did you see her do, if anything, when she came in the room?

The Witness: I refuse to answer.

Mr. Young: You refuse to answer on the ground it might incriminate you?

The Witness: Yes, sir.

Q. Now, after you left the room, did you see Officer Burns again? A. Yes, sir.

Q. Where did you see him again after you left the room? A. On the front porch.

Q. Where? [280]

A. On the front porch downstairs.

Q. Is that outside or inside? A. Inside.

Q. What took place in the front of the house?

A. A little struggling.

Q. Struggling with Officer Burns?

A. Yes, sir.

Q. Did you see "Speed" Warren at any time after you had seen her in the room?

A. Yes, sir.

Q. Where did you see her again?

(Testimony of Billie Florence Penland.)

A. I saw her at the same place Officer Burns was and also upstairs.

Q. You saw her at the same place where Officer Burns was and upstairs. Now, will you tell us briefly—you were struggling with Officer Burns and then what did you do, if anything?

A. I run upstairs.

Q. Did you see what Officer Burns did before you went upstairs? A. Just the struggling.

Q. Did you see him do anything or was he near "Speed" Warren at any time? A. Yes.

Q. What did you see the officer and "Speed" Warren do, if anything, while they were on this porch?

A. I just saw him here (indicating), struggling with him. That is all.

Q. Is that all you saw? A. Yes, sir. [281]

Q. You went upstairs? A. Yes, sir.

Q. Did you see "Speed" Warren again?

A. Yes, sir.

Q. Upstairs? A. Yes, sir.

Q. And about how long after you had gone upstairs? A. About five minutes.

Q. About five minutes. Did you have a conversation with her up there?

A. Not a conversation. I just asked her for some water.

Q. And did she say anything to you?

A. Yes, sir.

Q. What did she say to you at that time?

(Testimony of Billie Florence Penland.)

A. She told me to go in the closet and stay there; there was an officer upstairs.

Q. Did she say anything else?

A. And also that she had pulled the switch.

Q. She told you that upstairs?

A. Yes, sir.

Q. Then what did you do, if anything?

A. I went into the room and get in the closet and stayed there.

Q. Are you sure of that conversation upstairs?

A. Yes, sir.

Q. Did you know what switch she was talking about? A. Yes, sir.

Q. What switch was that?

A. The one she has downstairs by the door. [282]

Q. Where is that located in the house?

A. It is inside, just at the bottom of the stairs as you go up to the front room.

Q. Is it on your right or left as you come in the front door? A. On the right.

Q. Where is the switch located, as far as the part of the building is concerned?

A. On the post close to the front door.

Q. On the outside or inside?

A. On the inside.

Q. Of the door, leading up by the steps on the righthand side, is that correct?

A. That is right.

Q. Did she ever tell you anything else about that switch?

(Testimony of Billie Florence Penland.)

A. Well, she told me never to touch it.

Q. Did she tell you why?

A. She said it was charged; it was charged to the door.

Q. It was charged to the door. Did she say anything else in reference to the charge?

A. Well, she said it was about 600 volts.

Q. She said it was about 600 volts? She told you that? A. Yes.

Q. Do you know of your own personal knowledge whether that was attached up to the door?

A. No.

Q. You do not? A. No. [283]

Q. Did you ever touch that door?

A. I touched the door but not the switch.

Q. On the night of August 3rd, did you ever touch the door?

A. Just when I let Officer Burns in?

Q. When you let Officer Burns in?

A. Yes.

Q. Did you touch it after that?

A. Not after; I touched it a couple of times before that.

Q. Did you ever touch that switch?

A. No, sir.

Mr. Young: May I have just a moment, your Honor?

Q. Did "Speed" ever tell you, if you recall, what that switch was for? A. Yes, sir.

Q. What did she say?

(Testimony of Billie Florence Penland.)

A. She said it was put there to keep the drunks away.

Q. Anything else?

A. Well, she also stated that she used that in case of a raid.

Q. When did she tell you this?

A. I can't remember the exact date.

Q. Do you know of your own knowledge, Miss Penland, whether or not you can see from the window above the garage down to the front door from upstairs? A. Yes, sir.

Q. The window that you say "Speed" Warren looked out? A. Yes, sir. [284]

Q. Have you ever looked out of that window?

A. Yes.

Q. You can see who is outside the front door?

A. Yes.

The Court: The answer was yes.

Q. Do you know whether or not, of your own knowledge, there was any light burning on the outside of the door when you let Officer Burns in?

A. Yes, sir.

Q. Where is that light located?

A. Above the door, outside.

Q. You think you can indicate about where on that picture D, Prosecution's Exhibit D?

A. (Indicating).

Mr. Young: Indicating just above the door.

Q. You discussed this case with me in my office, Miss Penland? A. Yes, sir.

(Testimony of Billie Florence Penland.)

Q. Everything you have testified here is the truth? A. Yes, sir.

Mr. Young: Your witness. I think it is about twelve now, your Honor. If counsel wants to cross-examine her——

Mr. Dwight: No, it is quitting time.

The Court: For the reasons stated to me and on the motion made by Mr. Dwight, a continuance is granted and the case continued until nine o'clock tomorrow morning with the understanding it will continue all day. The jury is under the same instructions. Court will adjourn until tomorrow morning at nine o'clock.

(A recess was taken until Thursday, February 10, 1938, at nine o'clock a. m.) [285]

CERTIFICATE OF REPORTER

I Hereby Certify that the foregoing, consisting of Volume I, Part I, pages number 1 to 285, inclusive, and the following, consisting of Volume I, Part II, pages number 286 to 598, inclusive, to be a full, true and correct transcript of my shorthand notes in the above-entitled matter.

Dated: Honolulu, T. H., May 27, 1938.

GEORGE R. CLARK

Official Shorthand Reporter,
Circuit Court, 1st Circuit,
Territory of Hawaii

[Endorsed]: Filed Aug. 1, 1938. [285A]

Honolulu, T. H., Feb. 9, 1938.

(The trial was resumed at 9:04 a. m.)

Further Trial by Jury

(At the hour of 9:04 a. m., both counsel being present, and the jurors all being present, the following further proceedings were had and testimony given:)

The Clerk: Criminal 14,332 Territory of Hawaii against Ilene Warren alias "Speed" Warren.

Mr. Dwight: Ready for the defendant. We are willing to stipulate the defendant and the jury are present.

Mr. Young: Ready for the Territory. So stipulated.

The Court: Let the record so show,—ready for both sides. Proceed.

Mr. Young: Miss Penland.

The Bailiff (Mr. Cabral): Three calls, no answer.

Mr. Young: Let the record show this witness was ordered to return here at 9 o'clock a. m. today.

Mr. Dwight: I will ask that a bench warrant issue.

Mr. Young: I will join in that motion.

The Court: Bench warrant will issue returnable forthwith for witness Miss Billie Penland.

Mr. Dwight: And I also give notice that in the event she is not produced, I intend to file a motion to strike her testimony and a motion that a mistrial be entered forthwith. [286]

The Court: Proceed with other testimony.

Mr. Young: If your Honor please, at this time the Territory desires to offer into evidence a certain portion of the record in this case, and counsel and I have had some discussion as to the propriety of offering that as evidence. It is a portion of the affidavit filed in this Court by the defendant.

Mr. Dwight: May I suggest, if the Court please, if any offer is to be made, that the offer be made in the absence of the jury. It might be a good idea for the jury to take a recess and I hope we can locate this recalcitrant witness.

The Court: The jury will be excused from the court-room pending the offer of proof by Mr. Young. You may be excused and remain outside of the court-room.

(The jury retired from the court-room)

Mr. Young: If your Honor please, the Territory desires to read in evidence that portion of the affidavit filed in this Court by the defendant in support of her motion to suppress the evidence and to read that portion of the affidavit which states that the defendant was in legal possession and actual possession of the premises, certain premises at Muliwai Street, Wahiawa, City and County of Honolulu, being the premises involved in this case.

Mr. Dwight: I most respectfully object to the offer upon the ground that it is incompetent, [287] irrelevant and immaterial, and that any statements made in any affidavit or testimony given by the defendant upon a motion to suppress is incompetent, irrelevant and immaterial for any purposes

in the main trial. I am perfectly willing to submit authorities. I do know that the Ninth Circuit Court of Appeals way back—I think it was in 1921 or 1922—did hold that statements made in an affidavit upon a motion to suppress was admissible. Since that time the Supreme Court has overruled that. If the Court will excuse me, I will get that. I think it is the Liebowitz case or the Taylor case. Both of those cases came from the Ninth Circuit.

The Court: The Court will grant you that. Bring them in chambers. The Court takes a short recess.

(A recess was taken at 9:10 a. m. and at 9:30 a. m. the Court reconvened.)

Mr. Young: If the Court please, in view of the fact that this witness is now here, we can take up that other matter later. (Objection sustained; see Tr. p. 351).

The Court: The offer of proof will be continued until another time. Will you take the stand, Miss Penland. You understood you were to be here at 9 o'clock?

The Witness: I missed my bus.

The Court: That is the only reason?

The Witness: Yes. [288]

The Court: The Court will withdraw the bench warrant and not take any action. Your explanation is satisfactory to the Court.

BILLIE FLORENCE PENLAND,

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination
(Resumed)

By Mr. Young:

Q. Miss Penland, are you acquainted with the downstairs floor plan of "Speed" Warren's house?

A. No, sir, not quite.

Q. Are you acquainted with the floor plan, how the rooms are located downstairs?

A. Well, I can explain the best I can.

Mr. Young: Just speak a little louder and face this way (indicating).

A. Well, I can explain to the best of my knowledge how the rooms are.

Q. Will you explain that, please? Just what rooms are downstairs?

A. Well, there is two rooms. You go into the reception room, then there is a hallway like, shower room and bath, another room, sort of a laundry room; right off the room is another bedroom and further down the hall, close to the back door, is another room, bedroom.

Q. Miss Penland, will you step down here a moment, please? Take this pointer here (handing to witness). Now, referring to Prosecution's Exhibit K in evidence, which is part of the plan——

Mr. Dwight: Never mind referring to it. [289]

(Witness steps down from the stand to the blackboard)

(Testimony of Billie Florence Penland.)

Q. (Continuing) Can you point out the room there that you went to?

The Court: Just a minute. What exhibit is that?

Mr. Young: Exhibit K in evidence.

Q. Will you point out the room that you went to with Officer Burns? I will explain. This is the front door (indicating), the stairs on the right-hand side as you go in (indicating); this is the stairs going up to the kitchen (indicating); this is the living room (indicating).

A. Here, this room (indicating on Exhibit K.)

Mr. Dwight: You mark a cross where the bedroom is.

(The witness marks a cross)

Q. This is the front hallway when you come in (indicating on Exhibit K); this is Muliwai Street up here (indicating); you come in this hallway (indicating), then the stairs go this way upstairs (indicating). You understand that? Then the other stairs go up here (indicating). This is the living room (indicating). Now, where are the bedrooms in that house?

A. Supposed to be along about here (indicating on Exhibit K).

Mr. Young: Along there.

Mr. Dwight: Indicating a section of the plan to the left, witness drawing a line down. Where did you start the bedrooms?

(The witness indicates)

(Testimony of Billie Florence Penland.)

Mr. Dwight: A couple of inches below the top line.

Q. How many bedrooms are there? [290]

A. Four.

Q. Four bedrooms on the bottom floor?

A. Yes.

Mr. Young: Take the stand. (The witness resumes the stand)

Q. Now, the bedroom that you went into with Officer Burns, how many doors are on that bedroom? A. Two.

Q. Where were the doors located with respect to the walls?

A. One door is in the middle of the bedroom and one in the rear, just about in the middle.

Q. You talk about a rear door. Was there a front door to the bedroom? A. Yes.

Q. Into what room did the door lead?

Mr. Dwight: You are talking about upstairs.

Mr. Young: No, the door of the room that she went into with Burns, the door.

A. It leads through that bedroom, then you can go out through the back door to the hallway.

Q. The front door to the bedroom?

A. Yes.

Q. When you went through the front door, where did you come out?

A. The back door of that same bedroom.

Q.. Now, with respect to that rear door of the bedroom, when you went out of that, where did you come out? A. Came out in the hallway.

(Testimony of Billie Florence Penland.)

Q. Which hallway? [291]

A. In the back, that leads clean around to the front room.

Q. You are talking about upstairs or downstairs?

A. No, downstairs.

Mr. Young: No further questions.

Cross Examination

By Mr. Dwight:

Q. You mean when you come out of the parlor and go into the bedroom, what door do you go into?

A. The front door.

Q. The front door. When you come out of that room, what door do you come out?

A. The back door.

Q. You went around the back way. You didn't go through the parlor off the road?

A. Then I came out the front door. Before that I used the rear door.

Q. Now, Miss Penland, your name is Florence Woytenko? A. Yes.

Q. How do you spell that?

A. My maiden name is W-o-y-t-e-n-k-o, Woytenko.

Q. Are you an alien or a citizen?

A. Citizen.

Q. Were you born in the United States?

A. I was born here.

Q. Now, Miss Penland, you stated on direct examination that you went out to Wahiawa on the

(Testimony of Billie Florence Penland.)

10th of June and you stayed there until the 3rd of August. Do you recall that? A. Yes, sir. [292]

Q. You also testified that during that period you were working for Mrs. Warren?

A. Yes, sir.

Q. What do you mean by that expression, "working for Mrs. Warren"?

A. As a prostitute.

Q. You were a prostitute? A. Yes, sir.

Q. By the way, have you ever been convicted of prostitution? A. No, sir.

Q. Of any other crime? A. Yes, sir.

Q. When weer you convicted?

A. I was up for fighting last year. I don't remember the exact date.

Q. How many times have you been convicted?

A. About three or four; I am not sure.

Q. Now, Miss Penland, when you say you were engaged in prostitution from the 10th day of June to the 3rd day of August, do you mean that you were having intercourse with men during that time?

A. Yes, sir.

Q. You were examined, were you not, on the 10th of June? A. Yes, sir.

Q. Do you care to divulge the result of that examination?

Mr. Young: I object to this as being incompetent, irrelevant and immaterial, based on hearsay and not proper cross examination. [293]

(Testimony of Billie Florence Penland.)

Q. You waive the privileged communication between you and your doctor?

(There was no answer.)

The Court: The objection is it is hearsay?

Mr. Young: I object on the ground it is incompetent, irrelevant and immaterial; it is not proper cross examination and that her information is based upon hearsay and for the further ground it is a privileged communication, and counsel, if I recall, was one of the ones insisting upon not laying bare the life of this type of witness.

Mr. Dwight: May it please the Court, if the Court will recall my question, I asked this witness if she would care to divulge the result of that examination and I was careful to give her the privilege. I submit she has waived that.

The Court: Objection overruled. Answer the question.

A. No, sir.

Q. You refuse to divulge that information?

A. Yes, sir.

Q. Were you examined by a doctor?

A. Yes, sir.

Q. On the 10th of June? A. Yes, sir.

Q. Were you examined by the doctor on the 12th of June? A. That I don't remember.

Q. Were you examined by the doctor on the 13th of June? [294]

A. I have not kept track of the dates.

Q. Were you examined by the doctor up to and including the end of July? A. Yes, sir.

(Testimony of Billie Florence Penland.)

Q. And from June 3rd to the end of July were you practicing prostitution in Mrs. Warren's house?

A. Yes, sir.

Q. Did you turn in any medical reports to Mrs. Warren? A. Yes, sir.

Q. And you gave it to Mrs. Warren?

A. Yes, sir.

Q. Were those reports negative or positive?

A. They were all negative.

Q. Every one of them? A. Yes, sir.

Q. The Wasserman test? A. Yes, sir.

Q. You deny that you were taking treatment for a venereal disease from the 12th of June until the 1st of August?

Mr. Young: If your Honor please, I object to this line of questioning as being incompetent, irrelevant and immaterial. What difference does it make whether this witness had a venereal disease or not. It is attempting to put into the record matter not properly belonging here.

Mr. Dwight: It is very material. The police will tell who can operate and a person with venereal disease cannot operate. She has testified she [295] operated.

The Court: The Court will allow you to ask the question.

(The last question was read.)

A. Yes, I did take treatments but I was not working during that period.

Q. You were not engaged in prostitution during that period? A. No.

(Testimony of Billie Florence Penland.)

Q. Then your statement that you were engaged in acts of prostution from June 10th until August 4th, is not the truth? A. That is right.

Q. You knew it was not the truth when you so testified? A. Yes.

Q. You deliberately intended to mislead this jury? A. No, sir.

Q. Why did you make that statement when you knew it was false? A. I am slightly nervous.

Q. You are slightly nervous, that is why you made that statement? A. Yes.

Q. Don't you suffer with hallucinations?

A. I don't know what you mean.

Q. You have funny ideas about what is said to you or what is done to you? A. No, sir.

Q. Do you recall telephoning my office one day [296] telling me that somebody was out there to shoot you? A. No, sir, I didn't telephone.

Q. What date was that you were in my office?

A. I don't remember.

Q. You don't remember. When did you first come to my office?

A. I don't remember the date.

Q. Sometime after the raid, wasn't it?

A. I believe it was the first day that I was let out of the police station.

Q. Oh, you were taken down to the police station? A. Yes, sir.

Q. How many days were you held?

A. I believe it is 48 hours; I am not positive.

(Testimony of Billie Florence Penland.)

Q. And while you were held down at the police station did they show you any wire, equipment, transformers and things like that?

A. Yes, sir.

Q. And they began to pump you?

A. Yes, sir.

Q. And you never talked until they showed you those things?

A. Well, I didn't intend to tell the truth for a while. Mrs. Warren had been very good to me, so I did want to protect her to a certain extent.

Q. So you did not say anything to the police until they flashed the electric wire, transformers and door? A. Yes.

Q. And then they compelled you to tell them what you knew about that door, is that correct? [297]

A. Yes.

Q. How many times did you make a statement to the police?

A. I believe I made two statements with Captain Hays and once with someone else—I don't know who it is—with the police. I made three statements.

Q. You made three statements? A. Yes.

Q. The first one while you were locked up to Captain Hays? A. Yes.

Q. When did you make the next statement?

A. The following day.

Q. When did you make your third statement?

A. I am not sure whether there is.

(Testimony of Billie Florence Penland.)

Q. When did you make the statement to the police, if you ever did, that Mrs. Warren told you that she pulled the switch? Is that the second statement or the third statement?

A. The second statement.

Q. You had been to my office before you made that second statement, hadn't you?

A. No, sir, I didn't go to your office until after I was released.

Q. But the second statement was made while you were in the police station?

A. While I was in the police station. All statements were made while I was in the police station.

Q. You recall coming to my office making a demand for some money that was in the money box? [298]

A. Yes, sir.

Q. Your demands were rather strenuous, weren't they?

A. Well, I had to have the money; I had no place to live.

Q. Who took the money?

A. I don't know.

Q. It was done when the police were in the house? A. Yes, sir.

Q. You went back with the police after the thing was all over to try to find the money and it wasn't there? A. Yes, sir.

Q. That house was locked up by the police?

A. Yes.

(Testimony of Billie Florence Penland.)

Q. You know that? A. Yes, sir.

Q. The police had the keys all the time?

A. Yes.

Q. When you went back there you found there was no money in the money box? A. Yes, sir.

Q. And you knew that to be a fact?

A. Yes, sir.

Q. You made demand upon Mrs. Warren for that money?

A. I didn't demand of her; I demanded of you.

Q. You made demand on me? A. Yes.

Q. You told me in a rather threatening manner and language that money would have to be produced by Mrs. Warren? A. Yes, sir. [299]

Q. In my presence you heard me telephone when you were in there? A. Yes, sir.

Q. To whom did I telephone?

A. I believe it was the police station.

Q. You knew it was to Mr. Kelley and the police station? A. I believe so.

Q. How many times did you come into my office?

A. I think I was there twice. You were in about twice and you weren't in.

Q. Let me refresh your memory. On August 7, 1937, you came into my office. That would be about three days after?

Mr. Young: I object to counsel telling the witness what was done by way of argument. I submit we stick to questions on the statements of the witness.

(Testimony of Billie Florence Penland.)

Q. You recall visiting my office on August 7th, four days after this incident? A. Yes, sir.

Q. And you came in company with another girl?

A. Yes, sir.

Q. That girl was Marjorie Scott?

A. Yes, sir.

Q. At that time you came in regarding the money that was in the money box, isn't that correct?

A. Yes.

Q. At that time, Miss Penland, did you tell me that you knew nothing of the incident of the death of [300] this police officer?

A. Yes, sir, I didn't know a thing about it for about—after Mrs. Warren was taken I was in the house for about an hour and a half. When the police came back they told me there was a murder committed but I did not know it before that.

Q. It was an hour and a half after?

A. It was an hour and a half after or so.

Q. That you first knew that someone had died?

A. Yes, sir.

Q. And Mrs. Warren wasn't anywhere near the place? A. No, sir.

Q. You told me that definitely?

A. Yes, sir.

Q. I told you you needn't answer any questions, didn't I? A. Yes.

Q. You came in on August 11, 1937?

A. I believe I did.

(Testimony of Billie Florence Penland.)

Q. You didn't come in with Miss Scott that time; you came in with another woman?

A. I went up there with my mother.

Q. You came in with this other lady?

A. Yes.

Q. And you again made demand upon me for the money? A. Yes, sir.

Q. Did you tell me then that money would have to be produced or you would know the reason why?

A. I think I made a statement similar to that.

Q. Then you came in again on August 13, 1937, this [301] time by yourself. Do you recall that?

A. Yes.

Q. And you again made this demand that if Mrs. Warren didn't give you the money, you would know the reason why? A. Yes, sir.

Q. Then I told you to go and lodge that complaint with the police, isn't that correct?

A. Yes, sir.

Q. And you never came into my office again, isn't that correct? A. Yes, sir.

Q. Now, I want to ask you, Miss Penland, if it was after the 13th of August that you went down there and told them that "Speed" pulled the switch, that "Speed" told you she pulled the switch?

A. The first time I made that statement was to Mr. MacFarland. I don't know the date it was.

Q. Mr. MacFarland was involved in another matter and that came a long time subsequent to this investigation? A. That I don't know.

(Testimony of Billie Florence Penland.)

Q. You don't know. Didn't you give Mr. MacFarland some information, the result of your information being an indictment against Mrs. Warren for another offense in the Federal Court?

Mr. Young: If your Honor please, I object to this. I don't know how far we should go.

Mr. Dwight: I am going to show her interest in making this statement. [302]

Mr. Young: I don't see that it is relevant in this case.

The Court: Objection overruled.

Mr. Dwight: Will you answer the question?

A. I don't quite remember making any other statement outside of that one about the switch.

Q. That statement about the switch was contained in your statement to Mr. MacFarland, isn't that right? A. Yes.

Q. Mr. MacFarland has no connection with local police? A. That I don't know.

Q. Do you know Sam Odle?

A. I don't know. I just met him out there.

Q. Haven't you been in company with him continually since the incident?

A. Just once in court and I seen him once in town.

Q. Didn't he come out once to your house on a drinking party and you called the police?

A. Yes, because he started getting loud.

Q. And he was sitting down on his seat doing nothing when you told him?

(Testimony of Billie Florence Penland.)

A. I asked him in a nice way to leave. He started getting nasty, talking loud.

Q. All right. Did you discuss this case with Mr. Odle?

A. No, sir, a very few words were said to him.

Q. You have been meeting him in town at a beer parlor, having drinks with Odle?

A. I met him one day at the house and met him once [303] after that. I asked him to please leave, as it was getting late. He didn't want to go; he had a friend with him.

Q. Do you know Peggy Miller?

A. I don't know her but I have heard of her.

Q. Did you talk to her about this case?

A. No, sir.

Q. Did you talk to her about what you were going to do with "Speed"? A. No, sir.

Q. Do you deny making this statement to Peggy Miller—— A. (Interrupting) Yes, sir.

Mr. Dwight: Let me give you the statement.

Q. (Continuing) ——that if that money isn't paid by "Speed", "I am going in and hang 'Speed' higher than a kite?" A. No, sir.

Q. You deny making that statement to Peggy Miller? A. Yes, sir.

Q. Do you know a girl by the name of Sally?

A. Yes, sir.

Q. Did you make a similar statement to this girl Sally, that you were going to hang "Speed"?

A. No, sir.

Q. You deny making that statement?

(Testimony of Billie Florence Penland.)

A. Yes, sir.

Q. You deny telephoning me and telling me that Mrs. Warren and her gang were down there trying to shoot you, trying to beat you up?

A. Yes, I do deny that. [304]

Q. You deny telephoning me to that effect?

A. I had prowlers around the house.

Q. Didn't you telephone me?

A. Not to my recollection; no.

Q. You don't recall that? A. No.

Q. Do you recall on another occasion telephoning to the police that Mrs. Warren was out there to shoot you, and the police went out, you had a fountain pen poking on your breast bone?

A. I had no fountain pen; I had a pin stuck back there.

Q. It might have been accidental, you would be afraid? A. Yes, sir.

Q. Didn't you telephone and say it was Mrs. Warren?

A. I didn't say it was Mrs. Warren. I did not accuse anybody.

Q. Have you had mental trouble in this respect?

A. No, sir.

Q. Have you ever had siphilis?

A. No, sir.

Q. You are sure about that?

A. Well, the doctor told me that I had a shanker.

Q. What else did he tell you? You don't have to answer if you don't want to.

A. That is all he told me.

(Testimony of Billie Florence Penland.)

Q. Do you recall one time, Miss Penland, rather recently, when, for no reason at all, you jumped out of a taxicab on Hotel Street?

A. I had a reason for that. [305]

Q. What is that?

A. I had a reason for that.

Q. You had a reason for that?

A. Yes, I was afraid of that cab driven, the statement he made to me.

Q. Do you have hallucinations of fear? You get afraid every once in a while.

A. No, not exactly.

Q. You rode—you were on Hotel Street when that happened, right up there by the Young Hotel, is that right?

A. It was in front of the Central Y. M. C. A.

Q. It was in front of the Central Y. M. C. A., good, old Puritanical establishment, well lighted.

A. Yes.

Q. You jumped out of the car because you didn't like the statement that the taxi driver had made, is that right? A. Yes, sir.

Q. Now, Miss Penland, while you were in the room—I am speaking now of the back room—and when Mr. Burns was in there, did Mr. Burns lay his hands on you?

A. Yes, he did grab me; yes, threw me across the bed.

Q. Did he lay his hands on Mrs. Warren?

A. Yes, sir.

Q. What did he do to Mrs. Warren?

(Testimony of Billie Florence Penland.)

A. He was struggling with her.

Q. What was he doing, if you were able to see?

A. I seen him holding her arms.

Q. What else?

A. That is all I saw, and I was trying to get away myself. [306]

Q. You got away?

A. Yes, sir, as far as the front portion. I was caught again and I broke loose again.

Q. And did you look back and see who was following you? A. No, sir.

Q. Was Mrs. Warren right back of you, fighting with Burns?

A. Yes, sir, Mrs. Warren was fighting with him. There was fighting all the way out to this door; yes, sir.

Q. And the three of you again met at the front parlor? A. Front porch, yes.

Q. The three of you continuing in a fight, all pulling and pushing and trying to get away, isn't that right? A. Yes, sir.

Q. Then you got away and ran upstairs?

A. Yes, sir.

Q. And what stairway did you go up?

A. The rear one that leads to the kitchen.

Q. You went up the back stairway?

A. Yes, sir.

Q. And that is all you know about what happened? A. Yes, sir.

Q. You were busy fighting and you saw yourself

(Testimony of Billie Florence Penland.)

and Mrs. Warren and Burns fighting from that back room to the front room?

A. From my bedroom to the front porch. [307]

Q. And then you got away and you went upstairs? A. Yes, sir.

Q. And what room did you go into when you went upstairs?

A. It is the—as you come up from the kitchen, it is on the righthand side alongside of the bath room.

Q. Did you see Mrs. Warren come up the front steps?

A. I did not see her come up the front steps but I heard her. I was in my room.

Q. Did you look out into the front room?

A. Yes, sir.

Q. Did you see a tall Chinese officer standing there with Mrs. Warren? A. Yes, sir.

Q. There was a police officer standing there all the time with Mrs. Warren? A. Yes, sir.

Q. You saw this man with Mrs. Warren when she came upstairs? A. Yes, sir.

Q. You say you asked her for a glass of water?

A. Yes, sir.

Q. She said, "Get into that closet" or "Stay out of sight", something like that, isn't that correct?

A. Yes, sir.

Q. Now, when did she tell you that she pulled the switch?

A. Here's the exact words she said:—I asked

(Testimony of Billie Florence Penland.)

her for a drink of water—"Get in there and hide; there is a police officer here so I pulled the switch."

[308]

Q. Then she finished and concluded her statement by saying, "I pulled the switch?"

A. Yes, sir.

Q. You didn't know anything about somebody being bitten by electricity for an hour and a half?

A. I didn't know there was someone killed; no, because she told me if she does pull the switch, she just wants to frighten them away from the door; that is what I thought she done.

Q. Not only was the police officer there but there was another man standing right there, wasn't there, when this alleged statement was supposed to have been made? A. Sergeant Odle.

Q. Sergeant Odle? A. Yes, sir.

Mr. Dwight: Your witness.

Redirect Examination

By Mr. Young:

Q. Miss Penland, what is Sally's last name, if you know? A. I don't know.

Q. Can you describe what type of person she is, where she works?

A. The last time I seen Sally she was at the California Hotel.

Q. What room there, do you know?

A. I don't know.

Q. How long ago was that?

(Testimony of Billie Florence Penland.)

A. I believe she was living then in the rear of [309] that hotel, sort of cottages like, I am here in the restaurant (demonstrating).

Q. Was she blonde or brunette at the time you saw her at the California?

A. She was blonde and I seen her on the street, she had changed to brown hair.

Q. About how old a person is she?

A. I don't think she is over 20.

Q. Now, everything that you have testified here this morning, is that based on your memory of what happened that night? A. Yes, sir.

Q. I understand from your cross examination you were a bit hesitant down the police station to testify or give a statement about "Speed" Warren because she had been good to you and you wanted to protect her? A. Yes, sir.

Q. You finally gave a statement? A. Yes.

Q. Is that statement the truth?

A. Yes, sir.

Q. Based upon your memory of what happened that night? A. Yes, sir.

Q. There has been some testimony about certain money in the possession of "Speed" Warren and Mr. Dwight, her attorney.

Mr. Dwight: That is not the statement,—the police swiped it.

Q. What kind of money is it? [310]

A. The money I earned at——

Q. Doing what? A. In prostitution.

(Testimony of Billie Florence Penland.)

Q. That was for that period that you lived there? A. Yes, sir.

Q. How much money did she have of yours?

A. She had over $50.00 I gave her for safekeeping.

Q. That was money you had earned from prostitution? A. Yes, sir.

Q. Now, when this statement was made upstairs about Mrs. Warren saying something about the police and that she had pulled the switch, did she say that to you alone? Were you the only one that could hear that or was someone else around?

A. I was the only one that could hear it.

Q. When did she say that to you, what part of the house?

Mr. Dwight: I am going to move to strike that answer that she was the only one that could hear it.

The Court: Motion granted; stricken on the ground it is a conclusion of the witness.

Q. In what part of the house?

A. Close to the door going into my bedroom.

Q. Where were these other people at that time?

A. One was standing by the settee, Mr. Odle was standing by the settee; the police officer was just about the center of the room.

Q. About how far were they from you and Mrs. Warren? Can you point out some object in here?

[311]

A. Mr. Odle would be about the corner of that door (indicating).

(Testimony of Billie Florence Penland.)

Q. Mr. Odle would be about the corner of that door? A. Yes, sir.

The Court: Where?

Mr. Young: The blackboard here (indicating).

The Court: The corner of that blackboard to where you are sitting? A. Yes, sir.

Mr. Young: About 20 feet, Mr. Dwight?

Mr. Dwight: I think so.

Q. Could you see Odle at that time when she was saying that to you?

A. I seen him before that.

Q. Before that? A. Yes, sir.

Q. Were either of those two men in your sight when she spoke those words to you about the switch?

A. No, sir, because I was standing inside the door. I looked out; I seen Odle was out there and a Chinese, went back into my room, went and asked her for a drink of water; she told me in a low voice a little bit above a whisper.

Q. And that is when she told you about the switch? A. Yes, sir.

A. You testified you were struggling in the room to get away from Burns? A. Yes, sir.

Q. When you finally got away, you ran across the room, the parlor? [312] A. Yes, sir.

Q. When did you see—while you were running across there, when did you see that struggling or fighting in the parlor?

A. I didn't see that struggling in the parlor but I heard Burns and Mrs. Warren struggling.

Q. You were facing the other way?

(Testimony of Billie Florence Penland.)

A. Yes, sir.

Q. You heard some noise behind you, that is right? A. Yes.

Q. When was the next time you saw Mrs. Warren after you left the room?

Mr. Dwight: I object to that as improper redirect. That matter was exhausted on direct; incompetent, irrelevant and immaterial for that reason.

The Court: Objection sustained.

(The last question was read.)

The Court: I withdraw that ruling and allow the question to be answered.

Mr. Dwight: I will refer to the record. I except upon the ground that the evidence directly shows that the identical question was asked on direct examination of this witness and the record shows her answer thereto.

The Court: The Court appreciates that. Let the record so show. It is overruled.

Q. Where was she after she left the bedroom?

A. On the front porch. [313]

Q. Was she nearer to you or closer to Burns?

A. Closer to Burns than she was to me.

Q. She was closer to Burns? A. Yes, sir.

Q. Now, the door that you came out, do you call that the front door or the back door?

A. That is the front door.

Q. That leads to the parlor? A. Yes, sir.

Q. The rear door, with reference to that, leads to—— A. Into the hallway.

(Testimony of Billie Florence Penland.)

Q. Can you go—if you go out the rear door of that bedroom, can you go to the front of the house without going through the bedroom?

A. Yes, sir.

Q. How do you get to the front of the house?

A. There is a hallway leads clean around the front.

Q. That is all on the bottom floor?

A. Yes, sir.

Q. Everything you have testified here is the truth? A. Yes, sir.

Mr. Young: No further questions.

Recross Examination

By Mr. Dwight:

Q. Miss Penland, only one more question. On or about the 30th day of July, did you file a certificate with Mrs. Warren from another doctor?

A. Yes, sir.

Q. To the effect that your condition had been cleaned up? [314] A. Yes, sir.

Q. And was it not after that date?

A. I don't remember the dates.

Q. Wasn't it after you had filed that certificate, that is when you started to practice prostitution, as you have testified to on direct examination, isn't that right? A. Sure.

Mr. Dwight: No further questions.

Mr. Young: That is all.

(Testimony of Billie Florence Penland.)

By the Court:

Q. May I ask just one question? Miss Penland, you have testified at the time Mrs. Warren made the statement to you upstairs that Sergeant Odle was near the corner of that blackboard, about 20 feet away from you. A. That is right.

Q. Where was that Chinese-looking officer? How far away was he?

A. Just a few feet from Sergeant Odle.

Q. Was he nearer or further away?

A. The officer was closer to Mrs. Warren than Sergeant Odle.

Re-redirect Examination

By Mr. Young:

Q. May I ask one more question? Was Mrs. Warren facing you or facing the other man when she spoke? A. Towards me.

Mr. Young: No further questions.

Mr. Dwight: I have no further questions. I am going to ask the Court to instruct this witness to [315] refrain from discussing her testimony with Sergeant Odle or any other person connected with the prosecution.

Mr. Young: I don't know whether the Court should instruct the witness.

The Court: The Court will so instruct you not to discuss your evidence with anyone, especially with Sergeant Odle, or any witness that may be excused in this case.

Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial. The evidence was produced and obtained in violation of the defendant's rights under the Fourth Amendment and Fifth Amendment of the Constitution; upon the further ground that the witness herself has admitted that she committed perjury and that this Court only recently—rather, our Supreme Court has held that any person who commits perjury is incompetent to testify.

Mr. Young: I don't recall any such admission by this witness.

Mr. Dwight: I refer to the record. I asked her if she came in here and deliberately lied.

Mr. Young: Just a minute. Counsel has no right to call this witness a perjurer.

Mr. Dwight: Just a minute. I take it for granted that counsel's questions are based on facts that are material. The Public Prosecutor did ask questions that were very material and [316] vital to the issue here. That witness deliberately made a false statement in regard to a material fact, and if that is a fact, that is perjury.

The Court: The Court reprimands you for using that word and denies the motion to strike and asks the jury to disregard it.

Mr. Dwight: May I except to the Court's remarks and ask that a mistrial be entered, as the remarks are prejudicial to the defendant?

The Court: The motion is denied. Before the next witness is called, the Court will declare a recess.

(A brief recess was taken.)

Mr. Dwight: May it please the Court, I would like the record to show my exception to the remarks of the Court as being prejudicial. I assign the same error and I now move a mistrial be entered.

The Court: Motion denied.

Mr. Dwight: Save an exception.

The Court: Exception granted.

MARJORIE SCOTT,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name?

A. Marjorie Scott.

Q. You live in Honolulu? [317] A. Yes.

Q. How long have you lived here?

A. Since June.

Q. Do you know a person by the name of "Speed" Warren? A. Yes, sir.

Q. Is she in the courtroom this morning?

A. Yes, the lady sitting there in grey (indicating the defendant).

Mr. Young: Let the record so show.

(Testimony of Marjorie Scott.)

The Court: Let the record so show.

Mr. Young: Miss Scott, we will all appreciate if you will speak a little louder; just a little louder, please.

Q. How did you happen to know "Speed" Warren? When did you met her?

A. I *M*et her in town. I was sitting in a cafe, eating with a friend of mine. Mrs. Warren walked in and was introduced to me in the cafe.

Q. And did you meet her then?

A. Yes, sir, this friend introduced her to me.

Q. Do you know where she lives?

A. Yes, sir, I do.

Q. Did you know where she lived on August 3, 1937? A. Yes, sir, I do.

Q. Where did she live at that time?

A. At Wahiawa.

Q. Now, Miss Scott, will you please speak up a little louder, please? A. She lives in Wahiawa.

Q. What place in Wahiawa? [318]

A. But I don't know the correct address of the place.

Q. Would you know a picture of the house if you saw it again? A. Yes, sir, I would.

Q. Miss Scott, will you please look at these pictures on the board, Prosecution's Exhibits "D", "E", "F" and "G" in evidence? (Indicating)

A. (Examining same) Yes, sir, that is her house.

(Testimony of Marjorie Scott.)

Q. Is that the house that "Speed" Warren lived in on August 3, 1937? A. Yes.

Q. Have you ever been in that house?

A. Yes, sir, I have.

Q. When were you in that house?

A. While I was rooming with Mrs. Warren from June until—Well, I was there in August and I moved out.

Q. Of what year? A. Last year, 1937.

Q. June until August?

A. I moved out on the 4th of August.

Q. On the 4th of August? A. Yes, sir.

Q. Why do you remember that day?

A. It was the night after the raid, I moved out; around the 6th of August I moved out.

Q. You were living with Mrs. Warren there?

A. Yes, sir.

Q. Who else was living in the house at the time you were there?

A. Well, just Miss Penland, Mrs. Warren and [319] myself.

Q. Were you doing any work of any kind for Mrs. Warren while you lived there?

Mr. Dwight: Objected to as leading.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception noted.

Mr. Young: You may answer.

A. Yes, I was entertaining men.

Q. What do you mean by "entertaining men"?

(Testimony of Marjorie Scott.)

Mr. Dwight: May I suggest that the witness be advised as to her rights under the constitution?

Mr. Young: I have no objection to your Honor so instructing her.

The Court: Miss Scott, you are advised by the Court that you have the constitutional right under the 5th Amendment not to testify against yourself or not to testify anything that may tend to incriminate you. You have that constitutional right and privilege. If you do not desire to answer any of these questions upon that ground, you may claim your privilege and constitutional right and refuse to testify. You understand that?

A. Yes, sir.

By Mr. Young:

Q. You want to explain what you mean by "entertaining men"? A. I would rather not.

Q. On the ground of your constitutional privilege, is that correct? [320] A. Yes, sir.

Q. Were you entertaining men during the whole period that you were there? A. Yes, sir.

Q. And for that service did you receive any compensation from anyone?

A. Yes, sir, I did.

Q. And did Mrs. Warren get any part of that compensation?

A. Well, I paid her for my board and room out of that?

Q. You paid her for your board and room, and anything else?

(Testimony of Marjorie Scott.)

A. That is all that was considered, my board and room.

Q. Now, the day before you left the premises you stated—I believe you stated that there was a raid? A. There was; yes, sir.

Q. Will you please tell the jury just what you know about that raid, what you saw there?

A. Well, I was in the back bedroom in my room and I heard a police whistle and I ran out and Mr. Burns placed us all under arrest in the house. I ran from the front room into the shower and hid. I heard a lot of commotion out there. I didn't see any of the officers outside.

Q. Approximately what time was it you heard this police whistle?

A. I don't know; I haven't any idea.

Q. Was it in the day time or evening?

A. It was late in the evening.

Q. Before the police whistle blew was there anyone else downstairs in that house, do you know, just before? [321]

A. Well, there was two soldiers from Schofield downstairs and myself.

Q. And yourself. Would you know those soldiers if you saw them again?

A. I would know one of them but I would not be positive of the other one.

Q. Do you know if one of them is out in the corridor now?

(Testimony of Marjorie Scott.)

A. Yes, one of them is out in the corridor.

Mr. Young: Mr. Bailiff, will you call Mr. Erpelding, please?

The Court: I don't think the bailiff heard you.

Mr. Young: (To the Bailiff) Call Mr. Erpelding.

(The bailiff responded by bringing a gentleman into the court-room and by saying "Sergeant Erpelding.")

By Mr. Young:

Q. Take a look at this gentlem*e*n (indicating the same person). A. Yes, sir.

Q. State whether or not he is one of the men that was downstairs that night? A. Yes, sir.

Mr. Young: (To the same person) Q. What is your name? A. Erpelding.

Q. Sergeant Erpelding? A. Yes, sir.

Mr. Young: Let the record show the identification, if your Honor please.

The Court: Let the record so show.

By Mr. Young:

Q. How was Sergeant Erpelding dressed that night, if [322] you know?

A. He had on a pair of blue trousers, white shirt, no cap.

Q. Civilian clothes? A. Yes, sir.

Q. This other man, was he in civilian clothes?

A. No, sir; he was in uniform.

Q. He was in uniform. Where did you first see Sergeant Erpelding that night, August 3, 1937?

A. I first saw him in the parlor.

(Testimony of Marjorie Scott.)

Q. You first saw him in the parlor?

A. Yes, sir.

Q. Do you know how he got into the house?

A. No, sir, I don't.

Q. You first saw him in the parlor?

A. Yes, sir.

Q. Did you talk to him in the parlor?

A. Yes, sir, I did.

Q. As a result of that conversation, did you go any place or do anything?

Mr. Dwight: May I suggest, your Honor, that the witness can refuse to answer that question, if she wants to.

Mr. Young: The Court has already instructed this witness and I think Miss Scott understands her privilege.

The Court: You understand your privilege all throughout this testimony?

A. Yes, sir. [323]

By Mr. Young:

Q. What was your answer to that question?

A. Well, we went back in my bedroom and talked a lot.

Q. Now, did you later come out of the bedroom?

A. Yes, sir, we did.

Q. With Mr. Erpelding? A. Yes, sir.

Q. Was there anyone else out in the parlor when you came out?

A. This soldier in uniform was out there when we came out.

(Testimony of Marjorie Scott.)

Q. Do you know Billie Penland?

A. Yes, sir, I do.

Q. Did you see Billie Penland at any time on the bottom floor of that building?

A. Yes, sir.

Q. When did you first see her?

A. After I heard the police whistle.

Q. After you heard the police whistle. In what room were you when you heard the police whistle?

Mr. Dwight: Objected to as already asked and answered. She has already stated.

The Court: All right: Ask the question.

By Mr. Young:

Q. What room of that house were you in when you heard the police whistle?

A. After I saw them. I had just come back in the parlor, standing close to the door to the hallway leading to the back of the house. I heard the police whistle. [324]

Q. You heard the police whistle? A. Yes.

Q. You were in the parlor at that time?

A. Yes, sir in the parlor.

Q. Where did the sound of the police whistle come?

A. It came from the bedroom side of the house.

Q. Whose bedroom was that?

A. Billie Penland's.

Q. Did you do anything?

A. I went and opened the door to see if Billie was all right.

(Testimony of Marjorie Scott.)

Q. That is, the door to Billie Penland's room?

A. Yes.

Q. What door is that you opened?

A. The door from the parlor leading into the bedroom.

Q. The door from the parlor leading into the bedroom? A. Yes, sir.

Q. And when you opened the door, did you see anything?

A. Officer Burns was there. He placed us all under arrest.

Q. Did you hear him say that?

A. He said everyone in the house was under arrest.

Q. What did you do then?

A. I closed the door and went and hid in the shower. It is right off the hall leading from the door to the back of the house.

Q. How long did you stay in the shower?

A. I stayed about an hour—at least two, and went in the bedroom and laid down again when they left.

Q. Had you seen Miss Penland or the Officer Burns [325] at any time before you opened the door after the whistle had blown?

A. Yes. I hadn't seen Miss Penland for at least an hour before that happened.

Q. Did you go over to the door and open it before that time? A. No, sir.

(Testimony of Marjorie Scott.)

Mr. Young: Pardon me just a moment, your Honor please.

Q. Now, did you see "Speed" Warren at any time during that evening?

A. Well, I hadn't seen her for quite sometime; no, sir.

Q. When is the first time that you saw her that evening before the whistle blew?

A. I should say about two hours before.

Q. Where was she at that time?

A. She was upstairs.

Q. When was the next time that you saw her after that?

A. At the police station in Honolulu.

Q. At the police station in Honolulu. I take it, you didn't see Mrs. Warren downstairs at any time after you had first seen her upstairs?

A. I did not.

Q. You didn't see her at any time after the police whistle blew in the house?

A. No, sir, I did not.

Q. Do you know where Sergeant Erpelding was when the whistle blew? [326]

A. Yes, he was sitting in a chair just right in front of Miss Penland's rooms in the parlor in front of her door.

Q. Did you at any time go near the front door after you heard the police whistle?

A. No, sir, I did not.

(Testimony of Marjorie Scott.)

Q. Do you know what the front door of "Speed" Warren's house looks like?

A. Yes, sir.

Q. Can you describe that?

Mr. Dwight: May I have my objection as incompetent, irrelevant and immaterial, as violating the defendant's rights under the 4th and 5th Amendments of the Constitution?

The Court: You may.

By Mr. Young:

Q. Will you describe what you remember of the front door?

Mr. Dwight: May I save an exception?

The Court: The Court will overrule the objection. Exception noted.

A. Well, the front door—there was one door that was tied back on the inside of the house and then the door that was kept closed all the time had a sheet of metal on the inside, one on the outside and had a little square window that had a curtain over it.

By Mr. Young:

Q. Do you know of your own knowledge what that sheet was used for on the front door?

A. No, I do not and I didn't at the time. [327]

Q. Do you know how the other soldier, the one in the soldier's uniform, got into the house?

Mr. Dwight: Already asked and answered. It is assuming something beyond the ability of this wit-

(Testimony of Marjorie Scott.)

ness to answer. She said she was in the bath room; when she came back a soldier was there.

The Court: You may ask the question.

Mr. Dwight: May I save an exception as incompetent, irrelevant and immaterial for the reasons stated?

The Court: Exception noted.

By Mr. Young:

Q. You understand the question?

A. How the soldier got in?

Q. Yes, the one in uniform. Who let him into the house? A. No, sir, I can't say.

Q. Did you hear any noise in any other part of the house at any place when you heard the police whistle or after?

A. I heard some commotion at the front and back door.

Q. What kind of commotion?

A. Someone was knocking and banging on the door.

Q. You went into the shower room; you didn't see anyone in the house? A. No, sir.

Mr. Young: Your witness.

Cross Examination

By Mr. Dwight:

Q. Miss Penland—— [328]

The Court: Miss Scott.

By Mr. Dwight:

Q. Miss Scott, pardon me, you say you moved out of the place on the 6th?

(Testimony of Marjorie Scott.)

A. It was approximately the 6th. We were held in the jail here for three days, I believe.

Q. You were held in jail for three days?

A. Yes, sir.

Q. And finally you were let out on the 6th?

A. Yes, sir.

Q. Now, when you say you moved out, how did you happen to go back into that place?

A. A police officer and matron were taken out there to get our things.

Q. You were taken out to get your things with a police officer. You recall where you got the keys?

A. The lady next door had the keys—no, the officer went to the police station at Wahiawa and got the keys.

Q. The police had the keys? A. Yes.

Q. You went down and went into the house. Were you looking for anything else?

A. We just got our clothes; we just hit out.

Q. Didn't you look around for the money box?

A. We did. Yes, we looked for the money box.

Q. You found the money box had been broken open?

A. We found out there wasn't anything in it.

Q. You found someone had taken a screw driver and broken open the money box? A. Yes, sir.

[329]

Q. You got your clothes and just moved out?

A. Yes.

Mr. Dwight: No further questions.

(Testimony of Marjorie Scott.)

Redirect Examination

By Mr. Young:

Q. Was any part of that money yours that you were looking for? A. Yes, sir.

Q. How much was yours?

A. I had around $80.00 in two envelopes in one box.

Q. What does that money represent?

A. Well, my fees for entertaining men.

Q. Mrs. Warren was holding it for you?

A. I had given her to take care of it for me.

Mr. Young: No further questions.

Mr. Dwight: That is all.

The Court (to the Witness): That is all. You are excused.

CHARLES W. ERPELDING,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Sergeant Charles W. Erpelding.

The Court: What is your last name?

A. Erpelding.

By Mr. Young:

Q. I take it, your are a Sergeant in the Army?

[330]

(Testimony of Charles W. Erpelding.)

A. That is right.

Q. Where are you attached?

A. Schofield Barr*aks.*

Q. How long have you been in Honolulu or the Hawaiian Islands? A. Eight years.

Q. Eight years. Do you know a person by the name of Ilene Warren, also known as "Speed" Warren? A. I do.

Q. Is she in the court-room here this morning?

A. Yes.

Q. Will you indicate where she is?

A. Right over there (indicating the defendant).

Mr. Young: Let the record show the indication.

The Court: Let the record so show.

By Mr. Young:

Q. How long have you known "Speed" Warren?

A. Oh, I guess practically ever since I have been over here.

Q. Do you know where she lives? A. Yes.

Q. Where does she live?

A. I don't know what street it is on.

Q. You know what part of the Island?

A. Well, it is in Wahiawa.

Q. Would you know a picture of that house if you saw it again?

A. I believe I would. I wouldn't say for sure.

Q. Will you look at the four pictures on the board, Exhibits "D", "E", "F" and "G", and tell

(Testimony of Charles W. Erpelding.)
me whether or [331] if you remember that as being the house?

A. (Examining the pictures) This is the house.

Q. What is that, the front or rear entrance (indicating on Ex. "D")?

A. It is the front.

The Court: What exhibit?

Mr. Young: Exhibit "D".

Q. Have you ever been to that house?

A. Yes.

Q. When were you there the last time?

A. Well, I don't remember the date.

Q. Well, approximately. There is evidence in this case, Sergeant, that you were in the house on August 3, 1937. Was that the last time you were there? A. Yes.

Q. What happened that time, if anything, while you were there?

A. The place was raided by the police officers.

Q. Do you know about what time that happened?

A. Well, as near as I can recall it, between eight and nine o'clock.

Q. Prior to that date, when was the last time you had been there?

A. I couldn't say as to that.

Q. Did you go there often?

A. I expect I have been there six or seven times in the time I have been over here.

Q. In the eight years?

(Testimony of Charles W. Erpelding.)

A. That is right.

Q. Can you give us the last time of your visit before [332] August 3rd, before then?

A. I don't remember.

Q. What was your purpose of being there?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Dwight: Exception.

The Court: Exception noted.

A. I went over there to visit, to see a girl that was there.

By Mr. Young:

Q. You went over to visit a girl?

A. That is right.

Q. How did you get into the house?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, may it please the Court. It is not within the issues of this case.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception noted.

A. I rang the door *w*ell. Somebody hollered down, who was there. I told them, "A soldier"; somebody let me in.

By Mr. Young:

Q. Do you know who let you in?

A. One of the girls down there let me in.

Q. Do you know who she was?

(Testimony of Charles W. Erpelding.)

A. I didn't then; of course, I do now.

Q. You went in the house then?

A. That is right.

Q. Where did you go in the house? [333]

A. I went in the back room, downstairs.

Q. Was there anyone else there when you went in? A. Nobody.

Q. Did anyone come in after you were there?

A. No, not that I know of.

Q. Well, did you see any people around there at any time after you got in the house?

A. Not until I had been in the back room and come out.

Q. Did you go into the back room with anyone?

A. Yes.

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, this whole line.

The Court: Objection overruled.

Mr. Dwight: Exception.

A. With one of the girls.

Mr. Dwight: May I ask this witness be instructed as to his rights.

Mr. Young: I have no objection.

The Court: Sergeant Erpelding, the Court instructs you that you have a constitutional right under the Constitution of the United States, the 5th Amendment, not to testify against yourself or answer any questions that may incriminate you. You do not have to answer any questions that may be asked by any of these attorneys that may tend

(Testimony of Charles W. Erpelding.)

to incriminate you. You have the constitutional privilege. You can exercise your privilege at any time you wish or waive it.

My Mr. Young:

Q. Now, Sergenat—Withdraw the last question, if your Honor please, for the purposes of the record. When [334] did you first see this girl that you went into the room with?

A. That night there.

Q. After you had come into the house?

A. Oh, I guess about two, three or four minutes after I got in there.

Q. And when you saw her, was there any conversation of any kind?

A. No, just "Hello", that is all.

Q. Did you say "Hello"? A. Yes.

Mr. Dwight: I am going to move to strike that as hearsay.

The Court: It may be stricken as hearsay.

By Mr. Young:

Q. As a result of the conversation that you had with her, did you go any place in the house?

A. I refuse to answer that question.

Mr. Young: You have already answered that you did go in the back room with her.

Mr. Dwight: I ask he be advised to withdraw that, he not having been advised of his rights.

The Court: Do you wish to withdraw that?

The Witness: I do.

(Testimony of Charles W. Erpelding.)

The Court: The answer will be withdrawn and the jury instructed to disregard it.

By Mr. Young:

Q. Now, Sergeant, when did you leave the house?

A. When the police officers took me away.

Q. When the police officers took you away. About how [335] long was that after you had come into the house?

A. Roughly, half an hour; probably less than that.

Q. Now, while you were sitting in the parlor, did you hear anything unusual after you came back from the room?

A. Yes, I heard a whistle blow. Somebody started banging on the outside and said, "Open up, police."

Q. You heard all that inside?

A. That is right.

Q. Now, was there any other man in there at that time when you heard the whistle?

A. Yes; I didn't know; after the whistle blew there was another man.

Q. Did you see a man in the parlor after the whistle blew? A. Yes, a soldier.

Q. Was he in uniform?

A. He was in uniform.

Q. Where was this girl that you first saw?

A. I don't know.

(Testimony of Charles W. Erpelding.)

Q. You don't know? A. No.

Q. After the whistle blew, what happened, if anything?

A. Why, I heard the banging on the outside; some girl and a man come running out of a room there.

Q. And you say a man and a girl came out of a room? A. That is right.

Q. What room did they come out of?

A. A room on my left; which one, I don't know.

Q. And which way did they go?

A. They went towards the front entrance.

Q. They went towards the front entrance of the house? [336] A. That is right.

Q. And were they together or were they apart?

A. One of them was ahead of the other, two or three feet apart.

Q. Two or three feet apart. Who was ahead, the girl or the man? A. The girl.

Q. And the man was behind her?

A. That is right.

Q. You saw them run across the room?

A. Yes.

Q. Did you see where they went?

A. They went in the front entrance and after that I couldn't say.

Q. You didn't see anything after they went into the front entrance? A. No.

Q. What did you do after that?

A. I sat right there.

(Testimony of Charles W. Erpelding.)

Q. How were these two people dressed?

A. They wasn't dressed.

Q. They weren't. You say you sat right there?

A. That is right.

Q. How about the soldier in uniform?

A. He stayed right there, too.

Q. He stayed right there. How long did you sit there?

A. Until the cops came and took us away.

Q. Was the other man, the soldier, in uniform there when the cops came?

A. Yes. I started to go towards the front door on [337] the inside of the sitting room. He stopped me and said, "I am a police officer". He stopped me; I went back and sat down.

Q. From the time that the whistle blew and when the police came, had you moved at all?

A. No.

Q. Had the other soldier got up, too?

A. Not to my knowledge, he did not.

Q. Do you know that other soldier?

A. No.

Mr. Young: Pardon me just a moment. May we have our eleven o'clock recess at this time?

Mr. Dwight: I think we can dispose of this witness in a very few minutes, if we delay the recess for a little while.

By Mr. Young:

Q. Mr. Erpelding, will you step down to this diagram, referring to Prosecution's Exhibit "K"

(Testimony of Charles W. Erpelding.)

in evidence? (The witness complies.) This is Muliwai Street up here (indicating); this is the front entrance of the house (indicating); front door; this is stairway going up to the right; stairway going right ahead; little hallway here (indicating); here's the parlor and bedroom marked on here (indicating on Ex. "K"). Will you state whether or not, from your best recollection, that is a portion of "Speed" Warren's home? A. Yes.

Q. The bottom floor? A. Yes.

Q. Will you take this ruler, please, and point to the [338] place, if you can, from which the two people ran out? (Handing ruler to witness.)

A. (Indicating with ruler) Right there; they came out and ran this way. They came out on my left. I was facing this way (indicating). These people came out from my left along there (indicating on Ex. "K").

Q. Where was this other soldier in uniform?

A. He was sitting over there on a chair or settee (indicating).

Q. I understand from your testimony after these two people passed out into the hall you couldn't see them any more?

A. No, sir, I couldn't see them any more.

Q. You remained there until the police came, is that correct? A. Yes.

Mr. Young: Take the stand.

(The witness resumes the witness stand.)

(Testimony of Charles W. Erpelding.)

Q. Did you at any time give this girl anything in the house?

A. I refuse to answer that question.

Q. You refuse to answer on the ground of your constitutional rights?

A. That is right.

Q. When you came in the house that night, will you state the condition of the weather?

A. It was raining, drizzling rain.

Q. Will you describe from your memory as to what you saw that night, what that door looked like, the front door looked like that night? You couldn't say what it looked [339] like? A. It was dark.

Q. Did you see anything in front of the door?

A. A door mat was there.

Q. What kind of a mat?

A. A metal scraper.

Q. It was there when you went in?

A. Yes, I wiped my feet on it.

Q. Then you went in? A. Yes.

Q. Where was the door mat in relation to the door? A. Right in front of it?

Q. Right in front of it?

A. That is right.

Q. Will you step up to Prosecution's Exhibit "D" and indicate where the door mat was?

A. (Complying) Right there (indicating).

Mr. Young: Pointing to Exhibit "D" at the foot of the door.

(Testimony of Charles W. Erpelding.)

Q. Where did this voice come from that said, "Who is there?" A. I don't know.

Q. When you came to the door and knocked and rang a bell somebody said something and you said, "A soldier"?

A. But when I was going in I did not know.

Q. Yes. A. I did not know who it was.

Q. Someone did? A. Yes.

Q. And you said, "A soldier"? [340]

A. That is right.

Mr. Young: Your witness.

Mr. Dwight: No cross examination.

Mr. Young: That is all, Sergeant: Take the eleven o'clock recess?

The Court: I had planned, in view of the fact we had quite a number of recesses, to continue and adjourn at quarter to twelve.

Mr. Young: I thought of the Reporter.

The Reporter: It is all right by me.

WILLIAM L. ODLE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Sergeant William L. Odle.

Q. I take it, you are in the Army, Sergeant in the Army? A. Yes, sir.

(Testimony of William L. Odle.)

Q. Where are you attached?

A. Service Company, 21st Infantry, Schofield Barracks.

Q. How long have you been in Hawaii?

A. About eight years.

Q. About eight years, that is, continuous service here? A. Yes, sir.

Q. Do you know a person by the name of "Speed" Warren, also known as Ilene Warren? [341]

A. Yes, sir.

Q. Is she in the court-room here this morning?

A. Yes, sir.

Q. Will you indicate where she is?

A. Yes, sir, right over there (indicating the defendant).

Mr. Young: Let the record show the identification.

The Court: Let the record so show.

By Mr. Young:

Q. When did you become acquainted with Mrs. Warren?

A. Well, I don't know exactly. When I first come over here, I guess.

Q. Where did you meet her?

A. Over at her house, I guess.

Q. Where is her house?

A. In Wahiawa.

Q. Do you know where it is in Wahiawa?

A. Yes, sir.

(Testimony of William L. Odle.)

Q. About how many times have you been to that house? A. I couldn't say.

Q. Roughly?

A. Twenty or thirty times.

Q. Twenty or thirty times in the period of eight years that you have been here?

A. Yes, sir.

Q. Would you know a picture of that house if you saw it again? A. Yes, sir.

Q. Will you please look at the exhibits on the board, Prosecution's Exhibits "D", "E", "F" and "G" in evidence [342] and tell the jury whether or not the house portrayed in these pictures is the house of "Speed" Warren?

A. (Examining the same) This one looks like it (indicating).

Q. Pointing to "F". A. Yes, sir.

Q. How about this one, "D"? (Indicating.)

A. I don't know.

Q. You couldn't state whether that was or not but "F" does look like that house? A. Yes.

Q. There was testimony in this case that you were in that house?

Mr. Dwight: Just a moment. I am going to object to anything that is leading.

Mr. Young: It is merely preliminary. I will withdraw the question.

The Court: Proceed.

(Testimony of William L. Odle.)

By Mr. Young:

Q. Do you recall the last time that you were there in that house? A. No, sir, I don't.

Q. Do you remember when it was?

A. No, sir.

Q. Was it this year or last year?

A. I think it was last year. I couldn't say for sure.

Q. Have you ever been at her house when anything unusual happened? A. Yes, sir.

Q. What happened at that time? [343]

A. Well, a police raid.

Q. A police raid? A. Yes, sir.

Q. And what do you know about that police raid? Tell the jury.

A. All I know, I was upstairs, me and "Speed", sitting up there talking and I heard a whistle. She said, "What is that?" I said, "Radio", and she got up and went downstairs.

Q. Was there anything else said between you two at that time, that you recall?

A. No, I don't think there was.

Q. No mention of any other word?

A. There might have been; I don't remember exactly.

Q. And after this whistle blew you say "Speed" got up? A. Yes, sir.

Q. Where had she been sitting?

A. Sitting on a chair by the door.

Q. By what door? A. The front door.

(Testimony of William L. Odle.)

Q. What do you mean by the front door? What do you mean by the front door, Sergeant?

A. Where the front stairs go down to the door.

Q. Down to the door? A. Yes.

Q. She was sitting near the door that leads downstairs? Is that correct? A. Yes, sir.

Q. Did you see her go out that door? [344]

A. I don't remember whether she went out the door or not. I think she did. I couldn't swear she did.

Mr. Dwight: Just a moment. I am going to move to strike that answer. It is purely a conclusion of this witness. He testifies he has no definite recollection whether she went down that door.

The Court: The Court will grant the motion and strike it.

By Mr. Young:

Q. In which direction did she go when the whistle blew?

A. I don't know. I didn't pay any attention.

Q. You don't know which way she went out of the room? A. No.

Q. What were you doing?

A. Reading the paper and listening to the radio.

Q. Did you take your eyes off the paper when you heard this police whistle?

A. She asked me what that was. I said, "Radio".

Q. Then what, you continued reading the paper?

A. Yes.

(Testimony of William L. Odle.)

Q. Is that why you didn't see where she went?

A. Yes, I guess.

Q. Now, did you see her at any time again during the evening?

A. After something happened downstairs she came back upstairs.

Q. About how long after the whistle blew did she come back upstairs? [345]

A. Ten or fifteen minutes.

Q. Had you at any time gone down those stairs after you heard the whistle?

A. No, sir.

Q. Did you at any time get off the couch?

A. Not until the police officers came up there and I got up.

Q. In other words, you didn't move from the time you heard the whistle until she came back?

A. No, sir.

Q. Did you hear any noise of any kind downstairs after the whistle blew?

A. Yes, sir, I heard some kind of a racket downstairs.

Q. Can you describe that racket?

A. Yes, sir, knocking on wood of some kind.

Q. Did you hear anything else?

A. I heard some hollering.

Q. Can you describe that?

A. Just hollering out, screaming like.

Q. And when "Speed" came up you say there was a police officer with her, right behind her?

(Testimony of William L. Odle.)

A. Yes, sir; there was two of them.

Q. Two of them? A. Yes.

Q. Do you know this girl, Billie Penland?

A. I know her when I see her.

Q. Do you know whether or not you saw her upstairs after the whistle blew?

A. No, sir, I don't remember whether I did.

Q. You don't think you did. Are you sure?

[346]

A. I am not sure.

Q. You might and you might not?

A. I am not sure.

Q. Your best recollection is you are not sure?

A. Yes.

Mr. Young: Your witness.

Cross Examination

By Mr. Dwight:

Q. Did you hear anybody, any voice out of the air say "Give me a glass of water" or any words like that?

A. Yes, I think so, after that police officer come up there.

Q. When the police officers come upstairs, what happened?

A. I think "Speed" wanted a *b*lass of water and I got up and got her a glass of water.

Q. That is as far as you recall it?

A. Yes.

(Testimony of William L. Odle.)

Q. You didn't see Miss Penland up there?

A. No, sir.

Q. The policemen were standing there all the time? A. All the time, yes, sir.

Q. Until Mrs. Warren was taken away?

A. Yes, sir.

Mr. Dwight: No further questions.

Mr. Young: That is all. No further questions.

[347]

HERMAN KELIIKIPI,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Herman Keliikipi.

Q. You are a police officer for the City and County of Honolulu? A. Yes, sir.

Q. What are *you* duties as a police officer, briefly?

A. I am a police officer out at Wahiawa, motor patrolman.

Mr. Young: I have in my hand the return of subpoena in this case and filed with this Court. (Showing same to Mr. Dwight.) I have in my hand return of subpoena, on the front bearing Sergeant Odle, Sergeant Erpelding, Corporal J.

(Testimony of Herman Keliikipi.)

Flynn; on the opposite page is the name Herman Keliikipi.

Mr. Dwight: Just a moment. I object to this question as incompetent, irrelevant and immaterial, having no bearing on the issues.

The Court: What is the purpose?

Mr. Young: To show that Flynn was subpoenaed and is out of the Territory.

Mr. Dwight: We don't know who Flynn is. It is too remote.

The Court: The Court will sustain the objection.

Mr. Young: That is all. No further questions.

The Court: (To the witness.) That is all. [348]

Mr. Young: At this point I desire to read in evidence the affidavit that was referred to. I think your Honor would like to go over the authorities.

Mr. Dwight: May I suggest this that at this time we continue the trial until tomorrow morning. I make a motion for the continuance of this trial. I make a motion for the continuance. I offer for the record the certificate of a reputable doctor practicing in the Territory. The defendant has sacrificed her health. I will offer the certificate of the doctor in evidence.

Mr. Young: I object to this on the ground it is hearsay. I have no objection to the continuance.

The Court: This may be part of the record. The Court grants your motion, Mr. Dwight, and con-

tinues the case until tomorrow morning at nine o'clock, and we will have this record for what it is worth as part of the case.

Mr. Dwight: I will be willing to take the matter up this afternoon at any time that is convenient.

The Court: At any time is convenient to me.

Mr. Young: Two o'clock is satisfactory.

Mr. Dwight: Make it a little later.

The Court: Take it up at 2:30. This matter is continued until tomorrow morning at nine o'clock, and the jury is instructed to observe the cautions heretofore given. [349]

Mr. Young: Before adjournment I would like to know whether we are going to proceed all day.

The Court: Do you know whether you will ask for another continuance tomorrow at noon?

Mr. Dwight: Yes. She can be here tomorrow morning.

The Court: Case continued and adjourned until nine o'clock tomorrow morning. Court stands adjourned.

(A recess was taken until Thursday, February 10, 1938, at nine o'clock a. m.) [350]

Honolulu, T. H., Feb. 10, 1938.

(The trial was resumed at 9:00 o'clock a.m.)

The Clerk: Criminal 14332 Territory against Ilene Warren alias "Speed" Warren.

Mr. Young: Ready for the Territory.

Mr. Dwight: Ready for the defendant.

Mr. Young: Stipulate the defendant and the jury are present, your Honor.

The Court: Let the record so show. The Court at this time is prepared to rule on the offer of the government in respect to the affidavit that was attached to the Motion to Suppress and the objection of Mr. Dwight thereto. The Court sustains the objection of Mr. Dwight. (See p. 287 of Transcript for offer.)

CLARENCE C. CAMINOS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Clarence C. Caminos.

Q. What is your occupation, Mr. Caminos?

A. Police officer.

Q. And what is your rank as a police officer?

A. Captain of the Vice Squad, Honolulu Police Department.

Q. How long have you been a police officer with the Honolulu Police Department?

A. For the last ten years. [351]

Q. How long have you been captain?

A. About six months.

(Testimony of Clarence C. Caminos.)

Q. About six months. You were with the Honolulu Police Department on August 3, 1937?

A. Yes, sir.

Q. What rank were you then?

A. A captain.

Q. A captain at that time? A. Yes, sir.

Q. Do you recall that date for any particular reason? A. Yes, sir.

Q. What reason?

A. I had an arrest made at Wahiawa, the home of Ilene Warren.

Q. Will you please tell the jury about that arrest?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, as the information is based upon the arrest having been obtained in violation of this defendant's rights under the 4th and 5th Amendments of the Constitution; upon the further grounds there was no arrest; upon the further ground that there was no proper, legal arrest made and upon the further ground that at the time this witness was a trespasser.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception.

By Mr. Young:

Q. What time did you go out there?

A. At Ilene Warren's place, you mean? [352]

Q. Yes. A. About five to nine.

Q. About five to nine? A. Yes, sir.

(Testimony of Clarence C. Caminos.)

Q. Was that morning, night or when?

A. In the evening, five p.m.—I mean about five to nine.

Q. Where had you been just prior to that?

A. I was at the Wahiawa Police Station.

Q. Who was with you, if anyone?

A. Captain Kalauli, Officer Francis Apoliona, Officer Yuen, Officer Chun and the deceased, Wah Choon Lee.

Q. And where did you go from the Police Station?

A. From the Police Station I came down Kuahiwi Street.

Q. May I interrupt, please. Will you step down to the diagram? (The witness steps down.) Maybe you can show us on here—I refer you, Mr. Caminos, to Prosecution's Exhibit "A" in evidence. This is a plan of a certain district in Wahiawa. This is Kuahiwi Avenue (indicating); Olive Avenue (indicating); Neal Street (indicating). Do you believe you are sufficiently familiar with the plat to show the course you went?

A. Yes. From Wahiawa Police Station we came along Kuahiwi Avenue, up Neal Avenue, up Muliwai to the driveway near this sisal plant (tracing and indicating on Ex. "A".) I stood there while Officer Burns came up to the front of Ilene "Speed" Warren's home. I walked up to the concrete walk, stood there for a while. I noticed the door open and Officer Burns walked in. While I

(Testimony of Clarence C. Caminos.)
was standing there with the other officers—I was there a couple of minutes—I [353] I heard a police whistle blow. I rushed up to the front entrance.

(The last answer was read.)

Q. Now, Mr. Caminos, how many men, police officers, were with you at the time you heard the whistle blow?

A. Just myself, Captain Kalauli, Wah Choon Lee, the deceased, and Officer Yuen.

Q. And Officer Yuen. Just turn around and face this way (indicating) so the jury can hear.

A. Captain Kalauli——

Q. How many of you? A. Four of us.

Q. Four of you. How many started from the court house? A. Seven.

Q. Where were the others?

Mr. Dwight: If he knows.

A. We came along down Kuahiwi Avenue until we got to around here somewhere in the rear of Ilene Warren's home (indicating on Ex. "A"), then Officers Apoliona and Chun took a little trail into a vacant lot here (indicating). Captain Kalauli, Officers Yuen and Burns——

Mr. Dwight: Just a minute. Who are the two went through this empty lot?

A. Francis Apoliona and Officer Chun.

By Mr. Young:

Q. Yes.

(Testimony of Clarence C. Caminos.)

A. (Continuing) Captain Kalauli, Officer Burns, Officer Yuen and Wah Choon Lee, the deceased, and myself, we walked down to the end of Kuahiwi Avenue. Officer [354] Burns took the railroad track towards Muliwai Avenue and the rest of the officers and myself came down Neal Avenue up to Muliwai until we got to this sisal plant here (tracing and indicating the route taken.)

Q. Now, who was in command or charge of this group of police?

A. I was in command, sir.

Q. Did you give any orders to these two men?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial.

Mr. Young: I submit it, your Honor.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception noted.

A. I told these two officers to be in the back here (indicating on Ex. "A") and when they hear the signal—the signal would be a blast of the police whistle—for them to rush up from the rear and guard this place here (indicating).

By Mr. Young:

Q. What do you mean by "this place"?

A. In the rear of "Speed" Warren's place.

Q. Now, there were four of you, then, after Officer Burns left you; there were four of you present when the whistle was blown, where you were standing?

(Testimony of Clarence C. Caminos.)

A. Yes, sir, where I was standing by the sisal plant.

Q. Were all of your police officers there?

A. Yes, sir.

Q. You were in command of all of them?

A. Yes, sir. [355]

Q. Now, when you heard the whistle, where were you officers, the four of you, in relation to the street and the property line?

A. We were out on the street, right near the sisal plant, on the corner of the boundary of "Speed's" property, that is, facing mauka.

Q. Do you know "Speed" Warren's house?

A. Yes, sir.

Q. Are you acquainted with the front door?

A. Yes, sir.

Q. Approximately how far were you from the front door——

A. You mean from the sisal plant?

Q. (Continuing) when you heard the whistle?

A. About sixty feet; might be a little bit more or less.

Q. Is that in a straight line of a course which would take you to get to the door?

A. That is in a straight line.

Q. Now, when you heard this whistle, which way did you go to the door? Did you take a straight line or did you go another way?

A. I went up the road into the walk here (indicating on Ex. "A").

(Testimony of Clarence C. Caminos.)

Q. Approximately how long did it take from the time you heard the whistle until the time you arrived at the door to get there?

A. About a half a minute.

Q. About half a minute? A. Yes, sir.

[356]

Q. Now, where were the other officers? What did they do, if you saw them, when the whistle blew?

A. My instructions was this——

Mr. Dwight: Never mind what your instructions were. Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

By Mr. Young:

Q. Will you take the stand, please? (The witness resumes the witness stand.) Do you know "Speed" Warren?

A. I have known her for about eight years.

Q. How well do you know her?

A. Very well. She speaks to me and I speak to her.

Q. She knows you by sight? A. Yes, sir.

Q. And you have spoken to one another, is that correct? A. Yes, sir.

Q. You know where she lives?

A. Yes, sir.

Q. Will you please take a look at the exhibits on the board, "D", "E", "F" and "G", and tell the jury whether or not that is the picture of the house where she was living on August 3, 1937?

(Testimony of Clarence C. Caminos.)

A. This is a picture of the house (indicating Ex. "D").

Q. That is a picture of the house. What part of the house are you pointing to on Exhibit "D"?

A. This is the front part of the house (indicating).

Q. Is that the front door? A. Yes, sir.

Mr. Young: Indicating on Exhibit "D" in evidence, your Honor. [357]

Q. Will you please tell the jury just what you did when you heard this whistle blow?

A. When I heard the whistle blow I ran up to the front door. I kicked the door on the right and noticed that the door didn't open in, it opened out. I told the other officer not to kick the door, being that the door opens out. He then——

Q. What officer was that?

A. Wah Choon Lee, the deceased.

Q. Wah Choon Lee, the deceased?

A. Yes, sir.

Q. Would you know a picture of him if you saw it? A. Yes, sir.

Q. I show you Prosecution's Exhibits "B" and "C" in evidence (handing same to witness). Will you look at these pictures?

A. (Examining the same) That is the officer.

Q. Is that Wah Choon Lee, the person you are talking about? A. The deceased.

Mr. Dwight: There is no more Wah Choon Lee.

(Testimony of Clarence C. Caminos.)

By Mr. Young:

Q. Now, you told this Wah Choon Lee, this police officer, not to kick in because the door opens out? A. Yes, sir.

Q. And what happened then?

A. He then rushed the door and he grabbed the metal part and I heard a yell, a loud yell, and I looked towards him, towards the left. I noticed that he was knocked back. I glanced to my left and I noticed that Captain [358] Kalauli had him. When I turned towards him, then I noticed the door was opened, partly opened.

Q. Now, how close were you to him at the time he grabbed the door?

A. I would say about a foot, might be less.

Q. About a foot, might be less?

A. About a foot, might be less.

Q. Where was he standing with relation to the door?

A. He was standing on my left right in front of the door.

Q. About how far from the front of the door?

A. About two feet.

Q. Did you notice what he was standing on, if anything? A. I couldn't say.

Q. What was the nature of the place that his feet were resting on?

Mr. Dwight: Objected to as leading.

The Court: Objection overruled

Mr. Dwight: Save an exception.

The Court: Exception noted.

(Testimony of Clarence C. Caminos.)

A. There was a concrete walk.

By Mr. Young:

Q. There was a concrete walk?

A. Yes, sir, and a steel mat at the front.

Q. A steel mat? A. Yes, sir.

Q. Was he on the steel mat or not?

A. That I couldn't say.

Q. Were you on the steel mat? [359]

A. Yes, sir.

Q. And was he standing right next to you?

A. Right next to me, sir.

Q. Will you please step down here (indicating) and let this represent the door here (indicating); this is the front door (indicating). You place yourself in the position that the deceased was at the time that he grabbed the iron and place me where you were.

A. (The witness steps down and complies with request) Here (demonstrating).

Q. This represents the door (indicating)?

A. Yes, sir.

Q. About like this (indicating)? A. Yes.

Q. Where were the other officers?

A. Somewhere in the back.

Q. You two were the closest? A. Yes, sir.

Q. Now, you just show the jury exactly the way he reached up and grabbed this sheet?

(Testimony of Clarence C. Caminos.)

A. He lifted up like this (demonstrating), grabbed it, yelled and fell back.

Q. Now, what was the condition of the weather when you heard the whistle blow?

A. Well, it had been raining before that.

Q. What *as* the condition of the walk as you came in, as you recall?

A. It was kind of wet.

Q. Now, how were you dressed?

A. I was dressed civilian and I had a rubber-soled [360] shoe.

Q. You had a rubber-soled shoe?

A. Yes, sir.

Q. What kind of rubber-soled shoes?

A. It is one of those suede shoes, cloth gum shoes.

Q. Mr. Dwight has a pair of shoes. Same type of soles?

A. Yes, it is the same kind of soles.

Q. Same kind of rubber soles? A. Yes.

Mr. Dwight: May the record show the witness identifies my shoes?

By Mr. Young:

Q. Now, during the time that you were there after you heard the whistle, just who all touched that door, to your knowledge, on the outside?

A. Wah Choon Lee.

(Testimony of Clarence C. Caminos.)

Q. From the time that the whistle blew until the time that the door was opened, how many people, to your knowledge, touched that door?

A. One.

Q. Who was that?

A. Wah Choon Lee, the deceased.

Q. Didn't you just testify that you kicked the door?

A. Yes, I kicked the door but I didn't grab it with my hand.

Q. How did you kick the door?

A. With my right foot.

Q. Was that before or after Wah Choon Lee grabbed the door and gave the yell? [361]

A. That is before he grabbed the door.

Q. That is before he grabbed the door?

A. That is before he grabbed the door.

Q. What portion of the door did you kick?

A. The right part of the center.

Q. The right part of the center?

A. Yes, sir.

Q. Now, can you describe to this jury just how that door looked to you that night?

A. Yes, sir.

Q. Will do you do that, please?

A. On the board?

Mr. Dwight: May I have my objection to this testimony upon the ground it is incompetent, irrelevant and immaterial and is an attempt to indi-

(Testimony of Clarence C. Caminos.)

rectly prove what this Court had positively excluded from the evidence under the ruling on the motion to suppress?

The Court: You may have your objection. Objection overruled. Exception noted.

By Mr. Young:

Q. Take a piece of chalk.

Mr. Dwight: May I ask this witness to confine his knowledge of that door to that incident and not to any other time, not an examination at the police station?

The Court: Mr. Caminos, will you confine your description to the way the door appeared from your memory at the time you were kicking it and not in any way based upon your observation [362] in the Police Station?

A. (Drawing on a sheet of paper tacked to the blackboard.) That is the door.

By Mr. Young:

Q. Now, you have got a line, what does that line represent (indicating on drawing)?

A. This here (indicating), that is the top of the metal plate.

Q. Is that the place where Wah Choon Lee grabbed, up here (indicating)?

A. Yes, sir.

Q. What is above here (indicating on Ex. "L")?

A. A screen and a gunny sack at the back.

Q. Now, where does this sheet end?

(Testimony of Clarence C. Caminos.)

A. About here (indicating on drawing).

Q. Will you draw a line, please?

A. (The witness draws.)

Q. In other words, it is a metal *stip* from this point to this point (indicating), these inside lines on the door? A. Yes, sir.

Q. What material is this, if you recall?

A. We had been guessing.

Q. You have got two little circles; what do they represent?

A. This is a Yale lock; this is a button (indicating on drawing).

Q. You mean a door button? A. Yes, sir.

Q. Now, where was this mat that you have spoken of? Can you draw that in, this steel mat?

[363]

A. (Drawing on paper). This is the walk.

Q. This is the walk and this is the mat? (Indicating on Ex. "L") A. Yes, sir.

Mr. Young: You are a pretty good artist. Take the stand, please.

Q. Now, if you recall, was there any handle on the door by which you could pull it out?

A. I couldn't recall that.

Q. You can't recall? A. No.

Q. Now, did Wah Choon Lee fall back immediately after touching this door, when he gave this yell, or what?

Mr. Dwight: Objected to as leading and *already* having been asked and answered. I object particularly to the word "immediately".

(Testimony of Clarence C. Caminos.)

The Court: Objection will be sustained.

By Mr. Young:

Q. Can you describe, Mr. Caminos, or illustrate just how the deceased acted when he came in contact with that metal plate? A. Yes, sir.

Q. Step down and illustrate.

Mr. Dwight: Objected to as already having been illustrated by this witness with all the gestures.

Mr. Young: After he came in contact.

Mr. Dwight: He can't tell whether he came in contact with anything. How can he say what happened to Wah Choon Lee and how can he say when? [364]

Mr. Young: After he touched the door, just how did his body act. That is what I want to know. Submit the question, your Honor.

Mr. Dwight: Same objection, calling for something beyond this witness' ability to answer. He is not a doctor.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception noted.

A. Just this way (demonstrating quivering), then he dropped back.

By Mr. Young:

Q. Now, you hesitated a while, while he was there. Let us have that over again.

A. Like that (again demonstrating).

Q. Approximately how long?

(Testimony of Clarence C. Caminos.)

A. About that length of time (demonstrating).

Q. Then you saw he fell in the arms of Captain Kalauli?

Mr. Dwight: Objected to as leading, assuming something not in evidence.

The Court: Objection sustained.

By Mr. Young:

Q. Now, what happened after this, if anything? What did you do?

A. When Wah Choon Lee, the deceased, fell back I glanced over my left side. I noticed that Captain Kalauli had him. When I turned towards my right, facing the door, I noticed then that the door was open and Ilene Warren was standing right in the porch there at the [365] entrance of her home and Officer Burns was standing at the entrance of the sitting room.

Q. And so, looking in, facing that door, on which side was Ilene Warren, the right or left, looking in?

A. She was on my left looking in.

Q. As you looked into the door?

A. Yes, sir.

Q. And where was Burns?

A. Burns was on my right, that is, the center of the door at the entrance of the sitting room.

Q. Now, did you do anything then?

A. Just as I faced the door and noticed Ilene Warren there, she asked me, "What is this all

(Testimony of Clarence C. Caminos.)

about?" I told her she was under arrest and she knew what it was all about. Then I asked Officer Burns, I says, "Where are the other women?"

Mr. Dwight: Just a moment. I want that answer.

(The last answer was read.)

By Mr. Young:

Q. Now, did you look at the door further?

A. Yes, sir.

Q. What did you do?

A. Before I stepped into the place I took my flashlight and flashed it on the door and up on the upper hinge of the door I noticed clearly a wire was soldered on the hinge.

Q. Will you just draw that part of the door, please?

A. (The witness draws on Exhibit "L".)

Q. That is the place where you saw the wire? (Indicating) [366]

A. Yes, on the hinge on the inside.

Q. Now, as you are looking at this door, facing it, wire hinge on this side (indicating), wire going there (indicating), with relation to this door, can you show which side "Speed" Warren was on as you go in? A. This way (indicating).

Q. Which way does the door open?

A. Opens out.

Q. Opens out? A. Yes, sir.

Mr. Dwight: May I move to strike this last answer of this witness, particularly that portion of

(Testimony of Clarence C. Caminos.)
the testimony wherein he says that the hinge—I mean that the connection was on the hinge inside of the door, upon the ground that it is a violation of this defendant's rights and upon the further ground that Captain Caminos was a trespasser.

The Court: You observed that at that time?

A. Yes, sir, at that time.

The Court: Objection overruled.

Mr. Dwight: Exception.

The Court: Exception noted.

By Mr. Young:

Q. What was the condition of the light on the outside just before you people got to the door?

A. I couldn't say the condition of the light, although there was a light there.

Q. Where was the light?

A. On top of the door.

Q. Will you step down and mark where the light was? [367]

A. (The witness steps down and marks on Ex. "L").

Q. What kind of a light was that?

A. Electric light.

Q. *What* that burning? A. Yes, sir.

Q. When you arrived at the door?

A. Yes, sir.

Q. Now, did you see the body of Wah Choon Lee again after you looked back over your shoulder and saw him? Did you see him again?

(Testimony of Clarence C. Caminos.)

A. I did.

Q. And where did you see him again?

A. You mean after the night or you mean the same night?

Q. At the time you looked around and saw him, I believe you have testified, in somebody else's arms? A. Captain Kalauli's.

Q. You turned around and saw the door open?

A. Yes, sir.

Q. Did you see Wah Choon Lee again?

A. Yes, sir, I did.

Q. How soon after that?

A. After Ilene Warren asked me to get dressed, I told Officer Yuen to go with her. Meantime Captain Kalauli told me to go out there and give him a hand. He told me to hold Wah Choon Lee while he would get an automobile to have him taken to the hospital.

Q. Did you see anyone take him away?

A. Yes, sir.

Q. Who took the body of Wah Choon Lee away?

A. Officer Edward Puulei and Officer Francis Apoliona. [368]

Q. Now, when you heard that whistle blow, what was in your mind? What did you think that was?

A. When I heard that whistle blow I knew an arrest had been made and the officer needed assistance.

Mr. Dwight: I move to strike as incompetent, irrelevant and immaterial and calling for the con-

clusion of this witness, based entirely upon hearsay. I would like to argue that point.

Mr. Young: I would, too. May the jury be excused? I would like to make an offer of proof.

The Court: All right. The jury will be excused, pending this argument.

(The jury left the court-room.)

Mr. Young: Let me make my offer of proof. If your Honor please, I proposed to show by this witness that he had an arrangement with all the officers. He was in command of this squad. They had an arrangement with the officer in the house. When they had sufficient evidence of a crime about to be committed, the signal was to blow the whistle. That officer blew the whistle. Caminos knew a crime was being committed or was about to be committed in that house. The other officers were in the same frame of mind. We have a right to show what was in the mind of the officer when he entered upon the premises, in order to show whether he had a lawful right upon the premises. That is the only way we can prove it. It is a well known exception. Where intent or motive is concerned, this man can testify upon that. That [369] is our purpose of this evidence.

Mr. Dwight: May it please the Court, the testimony of this witness so far, as I understand it, is they went up there to raid "Speed" Warren, I should judge, as far as the testimony is concerned, for the crime of maintaining a house of ill fame.

The Court is familiar already with the testimony adduced—either that or for the specific act of prostitution or perhaps fornication, whatever that may be, and that in the event that the act was committed, the police officer was to signal, thereby giving the police officers outside, who had no search warrant, who had no warrant of arrest, knowledge of that fact; and I will add, too, the additional fact that is not in evidence that this house was a notorious house of prostitution, just for the purpose of my argument, and that fact was known to Caminos and to Wah Choon Lee at the time they were out in the street. Now, that question has been definitely settled by the Ninth Circuit Court of Appeals and by the Eighth Circuit Court of Appeals.

The Court: Just a minute. You are going to get them?

Mr. Dwight: I have them; I have the citations. The Eighth and Ninth Circuit Courts of Appeals have definitely held and this Court is bound by that, and they are entitled to consideration at the hands of the defendant.

The Court: You are going to get those cases. [370]

The Court will take a recess.

(A brief recess was taken.)

(The jury returned to the court-room and jury box.)

(Testimony of Clarence C. Caminos.)

(The reporter read as follows:)

"Q. Now, when you heard that whistle blow, what was in your mind? What did you think that was?

A. When I *read* that whistle blow I knew an arrest had been made and the officer needed assistance."

Mr. Dwight: I move to strike that answer as incompetent, irrelevant and immaterial, as calling purely for the conclusion of this witness, based upon no fact whatsoever.

The Court: Well, the Court will grant that motion as calling for a conclusion—he knew what happened—that is, the answer on the motion to strike.

By Mr. Young:

Q. Now, Mr. Caminos, what was in your mind after you heard that whistle when you started to go on the premises?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial on the grounds already stated.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception noted.

A. At the time I heard the whistle I had in mind that some kind of an arrest had been made and that he needed assistance. [371]

(Testimony of Clarence C. Caminos.)

By Mr. Young:

Q. And that you were going on there to assist an officer? A. Yes.

Q. Officer Burns? A. Officer Burns.

The Court: Mr. Young, did you state that you wanted to put that doctor on?

Mr. Young: No, I would rather take this evidence.

Q. Now, did the other officers with you follow you? A. Yes, sir.

Q. Did they do so at your command?

A. Yes, sir.

Mr. Dwight: Objected to as leading, both questions.

The Court: It is already asked and answered.

Mr. Dwight: I move to strike the answer. I withdraw my objection to save time.

A. Yes, sir.

The Court: Proceed.

By Mr. Young:

Q. Now, do you know how the deceased was dressed? A. He was dressed in civilian clothes.

Q. He was dressed in civilian clothes?

A. Yes, sir.

Q. And do you know what kind of shoes he was wearing? A. He had leather shoes on.

Q. Do you know that? A. Yes, sir.

Q. What kind of soles were on the shoes? [372]

A. Leather soles.

(Testimony of Clarence C. Caminos.)

Q. Now, at what place did you make this arrangement about the whistle blowing?

A. At the Wahiawa Police Station.

Q. Who was present at that time?

A. All the officers that accompanied me down.

Q. Was the deceased there? A. Yes, sir.

Q. When you heard this whistle did you believe that a crime had been committed?

Mr. Dwight: Objected to on the ground as calling for a conclusion of this witness and as incompetent, irrelevant and immaterial.

Mr. Young: It is relevant to show this man's mental state at that time.

Mr. Dwight: May I ask that the question be read?

(The last question was read.)

Mr. Dwight: My objection is that it is calling for the conclusion of this witness.

The Court: It has already been asked and answered.

(The reporter read as follows:)

> "Q. Now, Mr. Caminos, what was in your mind after you heard that whistle when you started to go on the premises?
>
> A. At the time I heard the whistle I had in mind that some kind of an arrest had been made and that he needed assistance."

Mr. Dwight: I move to strike that answer, particularly the latter portion of that answer as purely [373] calling for a conclusion of the witness.

(Testimony of Clarence C. Caminos.)

The Court: Motion denied.

Mr. Dwight: Exception.

The Court: Now, read this last question.

(The reporter read as follows:)

> "Q. When you heard this whistle did you believe that a crime had been committed?"

The Court: The Court will sustain the objection on the ground it is leading and suggestive.

Mr. Dwight: Exception.

By Mr. Young:

Q. Well, did you have anything else in your mind at the time you heard this whistle? What did you have in your mind?

Mr. Dwight: Objected to as leading and already answered.

Mr. Young: I don't think the witness has answered.

The Court: The Court will allow that question to be answered. Objection overruled.

Mr. Dwight: Save an exception.

(The last question was read.)

By Mr. Young:

Q. Just what did you have in your mind?

A. That an arrest had been made and that he had called for assistance. That is why I went there for.

Q. That is why you went there. Did you have any suspicion as to what the arrest was for?

A. No, sir.

(Testimony of Clarence C. Caminos.)

Q. You didn't know what the arrest was for? [374]

A. No, sir.

Q. Or what crime was being committed?

A. No, sir.

Mr. Young: Will the Court excuse me just a moment.

The Court: Certainly.

By Mr. Young:

Q. Now, where did this all happen?

A. At the home of Ilene Warren at Wahiawa on Muliwai Avenue.

Q. That is on this Island? A. Yes, sir.

Q. City and County of Honolulu?

A. Yes, sir.

Mr. Young: No further questions.

Cross Examination

By Mr. Dwight:

Q. Caminos, how did you happen to go out to Wahiawa with this large group of police officers?

A. I received complaints from the citizens out there.

Q. That is why you went out? A. Yes, sir.

Q. You recall testifying here on January 29th?

A. Beg pardon?

Q. You recall testifying here on January 29th of this year? A. Yes, sir.

Q. Do you recall in answer to that question you stated you were ordered out to make a raid on "Speed" Warren? [375] A. I don't recall that.

(Testimony of Clarence C. Caminos.)

Q. You don't recall. If the reporter refreshes your memory—— A. It might be.

Q. We will take it up in the recess. You deny that you told me that you were ordered out to Wahiawa to raid "Speed" Warren?

A. I wouldn't deny that.

Q. You wouldn't deny that?

A. I don't recall saying that.

Q. Well, what were you going out to Wahiawa for?

A. I was going out to Wahiawa to make a raid on the home of Ilene Warren.

Q. Exactly, and you were ordered out there to make that raid? A. Yes, sir.

Q. By whom?

A. By the Chief of Police, William A. Gabielson.

Q. And you knew at that time that "Speed" Warren had never been convicted of any offense?

A. I knew she was convicted of one.

Mr. Young: It is calling for the conclusion of this witness, your Honor.

The Court: It has already been asked and answered.

Mr. Young: I object. Anyway, I ask the answer be stricken and the jury instructed to disregard it.

Mr. Dwight: I have no objection to it being stricken, if counsel objects. [376]

The Court: It will be stricken on the suggestion of both counsel and the jury asked to disregard the question.

(Testimony of Clarence C. Caminos.)

By Mr. Dwight:

Q. You went out to Wahiawa? A. Yes, sir.

Q. Without any search warrant?

A. Yes, sir.

Q. You never had the people sign any affidavit to support a search warrant? A. No, sir.

Q. And you went out there without a warrant of arrest? A. Yes, sir.

Q. And wasn't that matter discussed in the Police Station? A. About the search warrant?

Q. Yes. A. No, sir.

Q. You weren't told you had no right to go there without a search warrant or warrant of arrest? A. No, sir.

Q. It was not discussed in conference?

A. No, sir.

Q. Do you know Judge O'Connor?

A. Yes, sir.

Q. You ever discuss this case with him?

A. No, sir.

Q. Now, you say, Mr. Caminos——

A. Yes, sir.

Q. (Continuing) you are positive that you went up, you [377] and your other officers went up Neal Avenue? A. Yes, sir.

Q. You are also positive Mr. Burns went up the railroad track? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

(Testimony of Clarence C. Caminos.)

Q. And you finally met—I was wondering why they had this on the map (referring to Ex. "A")—by the sisal plant? A. Yes, sir.

Q. You hid behind the sisal plant?

A. No, alongside.

Q. Did you see a big "No Trespassing" sign on that hedge? A. No, sir.

Q. You seen Mrs. Warren's sign?

A. No, sir, I seen it about a week ago.

Q. I mean a long time ago when you were a policeman at Wahiawa? A. No, sir.

Q. You didn't? A. No, sir.

Q. So you laid in wait just about over here somewhere (indicating on Ex. "A")?

A. Yes, sir.

Q. You say you saw Burns walk up the street and go to the door? A. Yes, sir.

Q. What did he do when he got to the door?

A. He stood at the door. If he did knock or press the [378] bell, that I couldn't say.

Q. You saw him go to that door?

A. Yes, sir.

Q. You had your eye on him all the time?

A. Yes, sir.

Q. You saw him go. You don't know whether he pressed the bell or not? A. Well, I couldn't say.

Q. Then he went in? A. Yes, sir.

Q. You watched him all the time? A. Yes.

Q. You are sure of that? A. Yes, sir.

(Testimony of Clarence C. Caminos.)

Q. Mr. Burns did not walk in, walk back around the house?

A. Mr. Burns did not walk around the house. He walked up to the door; he walked back to the sidewalk, then walked back.

Q. Did you talk your testimony over with Mr. Burns? A. No, sir, I did not.

Q. Was Mr. Burns' testimony of January 24th discussed with you in any way, Mr. Caminos?

A. No, sir.

Q. You are sure of that?

A. I am sure about that.

Q. Now, after you heard this whistle—Was it one whistle that you were to hear or what?

A. Well, my instructions was this,—when an arrest was made, to blow his whistle. I heard the whistle once. [379]

Q. You sent Mr. Burns in there to try and make a case of prostitution, fornication, to try to make one of the women? A. Yes, sir.

Q. To try to make one of the women. If he made the woman, to blow the whistle? A. Yes, sir.

Q. That is exactly what you told him?

A. Yes, sir.

Q. When he blew the whistle you thought Burns had had intercourse with the woman? A. No.

Q. Answer that question yes or no? A. No.

Q. What did you think when the whistle blew?

(Testimony of Clarence C. Caminos.)

A. When the whistle blew I had in mind an arrest had been made; for what offense, I couldn't say.

Q. You remember telling me on January 29th that you went in there because you thought the act of prostitution had been committed?

A. No, sir.

Q. Now, isn't that a fact, you thought he had committed intercourse with some girl, had given the girl marked money, had fixed it? A. No, sir.

Q. Didn't you give him instructions to have intercourse with one of the women?

A. I did not instruct him to have intercourse with the woman in that home.

Q. You just told him to go in there and give her [380] three marked dollars? A. Yes, sir.

Q. That is all you told him to do?

A. Yes, sir.

Q. When he blew the whistle you knew that Burns had gone in and given this woman three marked dollars?

A. At that time I did not think that Burns had gone in. I thought that Burns had given someone else the money to go in and when this person had gone in an arrest had been made.

Q. Now, you marched up with all the police officers? A. Yes, sir.

Q. You sent Burns ahead to go in?

A. Yes, sir.

(Testimony of Clarence C. Caminos.)

Q. You told Burns, according to your testimony, that Burns was to go in and give this woman three dollars; when he gave her three marked dollars, blow the whistle?

A. My instructions was when Burns got in to see that she got the money, but Burns was instructed not to have intercourse with any of the women in the place.

Q. He was instructed not to have intercourse with anybody? A. Yes.

Q. Now, I get it: First, Burns was instructed to go in there and not have intercourse with anyone? A. Yes, sir.

Q. Then when he got in to see that somebody got three marked dollars? A. Yes, sir.

Q. After somebody got three marked dollars, blow the [381] whistle; that was his instructions?

A. His instructions was this, when he made an arrest in the place for him to blow his whistle if he wanted assistance. That is the way he was instructed.

Q. Oh, I see. In other words, he wasn't even ordered to make an arrest?

A. He was ordered to make an arrest. I instructed him that when he made the arrest in the place and if he wanted assistance, to blow his whistle.

Q. Let us go back. Let us get your instructions.

(Testimony of Clarence C. Caminos.)

Mr. Young: Why, the witness can't answer his questions completely.

By Mr. Dwight:

Q. Have you anything more to say in answer to that question? A. No, I have nothing further.

Q. You have answered the question?

A. Yes.

Q. So when Burns went in there he understood your instructions? A. Yes, sir.

Q. Did he say so? A. Yes, sir.

Q. In other words, he was not to have intercourse with anyone? A. Yes, sir.

Q. But he was to give somebody three marked dollars? A. Yes, sir.

Q. Then he was to arrest somebody and then blow the whistle? [382] A. Yes, sir.

Q. And then when the whistle blew, it was to be blown only if he needed assistance?

A. No, sir, if an arrest was made.

Q. If an arrest was made. In other words, when he made the arrest he blew the whistle?

A. When he made the arrest, to blow the whistle.

Q. It wasn't so much for assistance?

A. I would say for assistance.

Q. You remember testifying just two weeks ago, Mr. Caminos, about that?

Mr. Young: I object to counsel arguing with this witness that he switched his testimony.

(Testimony of Clarence C. Caminos.)

Q. I withdraw that. Do you recall, Mr. Caminos, testifying that you instructed Burns to go in and make a case of prostitution? A. I do not.

Q. And when he made the case, blow the whistle?

A. I did not tell him to go in there and make a case. I told him that in case he got into the home and if he felt that an arrest should be made for some kind of violation, to place the people under arrest and to notify us, the other officers, by a blast of his police whistle.

Q. Did you tell him to take off his clothes?

A. I did not.

Q. Did you tell him to remain naked until you could get in? A. I did not.

Q. Did he make any statement to you when he came to [383] the front door and was naked?

A. When he came to the door leading into the sitting room, I noticed that he had his undershirt on. I asked him where were the women that he had placed under arrest. He told me that they had got away from him and they tried to beat him up.

Q. Now, when you saw the door opened "Speed" Warren was standing there? A. Yes, sir.

Q. You recall me asking you that question, "Who opened the door?" That was only two weeks ago.

A. Yes, I remember you asking me that question.

Q. What was your answer?

(Testimony of Clarence C. Caminos.)

A. I couldn't say who opened the door.

Q. Are you sure? A. I am sure.

Q. Did you say "Speed" Warren opened the door? A. I did not.

Q. You deny making that statement?

A. I deny making that statement.

Q. You never talked to Young about this phase of your testimony since January 24th?

A. The prosecutor?

Q. Yes. A. I did.

Q. Mr. Young called your attention to the fact, did he not, that Mr. Burns had testified he opened the door? A. I don't recall that.

Q. You don't recall that. Did he call your attention to the fact that you had testified Mrs. Warren had opened the door? [384]

A. Mr. Young didn't tell me that.

Q. He did not tell you that? A. No.

Q. Now, Mr. Caminos, those statements that I called your attention to were made on January 28th and 29th in this Court. You remember testifying in this Court? A. Yes, sir, I remember.

Q. And they were reduced to writing, were they not? A. Yes, sir.

Q. You deny making the statement that "Speed" Warren opened that door?

A. Yes, sir, I deny making that statement.

Q. You say that you do not know who opened the door?

A. I do not know who opened the door.

(Testimony of Clarence C. Caminos.)

Q. "Speed" was in front?

A. She was standing in that screened porch.

Q. What was the first word Mrs. Warren said to you?

A. The first word Mrs. Warren told me, "What is this all about, Caminos?"

Q. That is the first thing she said?

A. Yes, sir.

Q. Then what did you say?

A. I told her she was under arrest and she knew what it was all about.

Q. That is what you told her? A. Yes.

Q. Now, do you remember testifying on January 29th,—28th that you arrested Mrs. Warren because the girls got away?

A. I didn't exactly arrest Mrs. Warren, being that the girls got away. [385]

Q. Isn't that what you testified to under oath?

A. I don't remember.

Mr. Young: Counsel has the statement. It is not a proper foundation. The witness has a right to see the statement to see whether or not he has made it. A proper foundation has not been made for impeachment. If counsel has the statement to show this witness, the witness has a right to see that statement.

Mr. Dwight: May it please the Court, I have a perfect right to call the attention of the witness to an inconsistent statement, if at such a time and place he made such a statement. If he made that

(Testimony of Clarence C. Caminos.)
statement, it will be produced to impeach his testimony.

(The last question and answer were read.)

By Mr. Dwight:

Q. Now, Mr. Caminos, you got to the front door first, did you say? A. Yes, sir.

Q. And how many people pounded on that door?

A. From the outside?

Q. Yes. A. Two people.

Q. How many times did you pound?

A. Once.

Q. Just one blow?

A. With my—I didn't strike it with my fist; I struck it with my shoe.

Q. How many times did Wah Choon Lee pound on that door? [386] A. I couldn't say.

Q. Did he pound on the door? A. Yes, sir.

Q. You only kicked once?

A. I only kicked once.

Q. You recall *testify* that there were about five or six blows on the door and finally you looked down, you said, "Hey, this door don't open in, it opens out;" you remember testifying to that?

A. I remember testifying.

Mr. Young: Objected to as leading. It is a double question. Let him separate the question. He is assuming one thing and asking him.

The Court: The witness has already answered. (To the witness.) You understood that question?

A. Yes, I understood that question.

(Testimony of Clarence C. Caminos.)

By Mr. Dwight.

Q. In other words, Mr. Caminos, you testified on the 29th or 28th of January that there were five or six blows on that door?

A. No, sir, I did not testify.

Q. You deny making that statement?

A. Yes, sir.

Q. You remember this man (indicating) was the Court Reporter? A. Yes, sir.

Q. Now, you say there was only one blow?

A. One blow by myself.

Q. How many blows by anybody else?

A. I am sure that Wah Choon Lee struck the door once [387] with his feet.

Q. With his feet? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. You were watching that?

A. Well, I couldn't say—I wouldn't say I was exactly watching him and not watching my part, but I am sure he kicked that door once with his feet.

Q. How about pounding?

A. I don't remember making that statement and I don't remember.

Q. I am not asking you if you made the statement. Do you remember if he pounded on the door?

A. No, sir.

Q. So I understand from you now you kicked the door with this rubber sole on it?

A. Yes, sir.

(Testimony of Clarence C. Caminos.)

Q. You looked over and saw Wah Choon Lee kick once with his leather-soled shoes? A. Yes.

Q. Then you ceased operations and you told Wah Choon Lee that the door opened out instead of in? A. Yes, sir.

Q. When did you discover that?

A. After that one kick.

Q. After that one kick you say Wah Choon Lee then reached up and pulled it?

A. Grabbed the metal part of the door.

Q. And pulled it? [388] A. And pulled it.

Q. You remember on the 29th you didn't say anything about the hiding and crouching business?

A. On the 29th they just asked me the question. They did not tell me to go out there and perform.

Q. Didn't I ask you quite a few questions?

A. Yes.

Q. You call demonstrating, Wah Choon Lee went up like this (illustrating), pulled and you thought he fell back? A. I didn't say that.

Q. Now, you say he was pulling, his *hand* were shaking and he fell back?

A. I made that statement; he gave a loud yell and he pulled back.

Q. You made that statement on the 29th?

A. Yes.

Q. Was Captain Levi right back of you all the time?

A. To the best of my knowledge, he was in the back of me.

(Testimony of Clarence C. Caminos.)

Q. And when you first went to the door, did you leave that front door and go somewhere else and then go back to the front door?

A. When I got to the front door and Wah Choon was knocked out, I looked back towards Captain Kalauli—towards Wah Choon and I noticed Captain Kalauli holding Wah Choon, so I turned back towards the house, facing the door. I stayed there for a while, while I instructed the other officers what to do, then Captain Kalauli told me to "Come here" and meantime I should say I was about six or seven [389] feet away from the door towards the right. Captain Kalauli told me to handle Wah Choon Lee, the deceased, while he would go out and get a car to get him to the hospital.

Q. Then you went back to the door?

A. Yes, sir.

Q. Did you hear any noises? Was that the time you heard some noises at the door?

A. That is when we were running up to the front entrance; that is when I heard the commotion.

Q. When was that?

A. I heard the commotion and Burns said, "I will have you arrested for assaulting a police officer."

Q. Burns said, "I will have you arrested for assaulting a police officer"? A. Yes, sir.

(Testimony of Clarence C. Caminos.)

Q. You heard Burns say that? A. Yes, sir.

Q. That was before you folks got to the door?

A. We were on our way to the door.

Q. You were on your way to the door, that is when you heard that statement? A. Yes, sir.

Q. Didn't you say, "Open up, police officers"?

A. I did.

Q. When did you say that?

A. While I was running up to the front door.

Q. Before you even got to the front door you said "Open up, police officers"?

A. As I got from the road on the concrete walk, heading to the front door, I said, "We are police officers, [390] open up the door;" something similar to that.

Q. "We are police officers, open up".

A. The door didn't open up right then. I kicked the door; Wah Choon Lee kicked the door. I said, "Don't kick the door because the door opens out." He grabbed the metal part, stood there for a couple of seconds. He was thrown back towards Captain Kalauli. When I glanced over my left, I noticed Captain Kalauli holding Wah Choon Lee. When I turned back towards the entrance I noticed the door was partly opened and "Speed" Warren was standing right on the screen porch that is on the front of the home and Officer Burns at the center of the door leading into the sitting room.

Q. Now, Mr. Caminos, you have been after "Speed" for a long time, haven't you?

(Testimony of Clarence C. Caminos.)

A. I wouldn't say that I have been after "Speed" for a long time.

Q. When was Mrs. Warren ever arrested for any crime—I mean not arrested, convicted?

Mr. Young: I object as still calling for a conclusion of this witness. It isn't shown he has any peculiar knowledge as to when a person was convicted. He is not competent to testify to that.

The Court: If you will qualify that, "if you know of your own knowledge."

By Mr. Dwight:

Q. Do you know of your own knowledge whether Mrs. Warren was ever convicted of any offense?

A. Once.

Q. When? [391]

A. During the old regime for liquor violations.

Q. Convicted?

A. To the best of my knowledge, she was convicted in Judge Plemer's Court in the District of Wahiawa, Honolulu, this Island.

Q. That was for some liquor violation?

A. That was for some liquor violation.

Q. That was way back in the good old days of prohibition? A. Just before the new regime.

Q. What do you mean by the "new regime"?

A. The Chief of Police.

Q. Oh, I see, but that is way back in the days of Charlie Rose? A. Sheriff Gleason.

Q. Sheriff Gleason. Can you estimate the time?

A. Ten years.

Mr. Young: I don't know.

(Testimony of Clarence C. Caminos.)

By Mr. Dwight:

Q. In other words, the only record, the only crime that you know that "Speed" was ever convicted of in the Territory of Hawaii was some liquor violation?

A. To the best of my knowledge.

Q. And that was way back before prohibition went out of existence?

A. Well, just before prohibition went out.

Q. The repeal? A. Yes, sir.

Q. That was about ten years ago?

A. I think it was in 1929, between 1929 and 1930. [392] I couldn't exactly say.

Q. That was the only thing you knew about her?

A. Yes, sir.

Q. You also knew of your own knowledge, did you not, that Mrs. Warren had never been convicted of running a disorderly house or house of ill fame or house of prostitution. Do you know that from your own knowledge?

Mr. Young: I object to that as immaterial, not proper cross-examination and calling for knowledge of this witness in a field he has no knowledge.

Mr. Dwight: He knows of his own knowledge.

The Court: Objection overruled. It is proper cross-examination.

By Mr. Dwight:

Q. Can you answer that yes or no?

A. No, sir.

(Testimony of Clarence C. Caminos.)

Q. She has never been convicted?

A. To the best of my knowledge.

Q. And you left on the evening of August 3rd with your vice squad to raid "Speed" Warren on that date with Officer Wah Choon Lee?

A. From the vice squad; the other men were from the District of Wahiawa.

Q. Now, as soon as you heard that whistle, did you run? A. Yes, sir.

Q. Pretty fast? A. As fast as I could.

Q. As fast as you could? A. Yes, sir. [393]

Q. And you were about 60 feet away?

A. About sixty feet away.

Q. Now, when did you look up at this corner and see a wire connected to that hinge?

A. Just before—at the place after the door was opened.

Q. After the door was opened? A. Yes, sir.

Q. Now, when you rushed up to that door you went there, as you say, as fast as you could possibly run? A. Yes, sir.

Q. You gave it a kick and things happened rather fast? A. Yes, sir.

Q. Now, when did you observe this metal mat?

A. I observed this metal mat that same evening.

Q. You mean on your way up, in all your haste, you glanced down and observed the mat?

A. No, sir, after Wah Choon Lee, the deceased, was taken to the hospital and I was standing there I flashed my light and I noticed that I stepped on a steel mat there at that time.

(Testimony of Clarence C. Caminos.)

Q. That was the time that you noticed it after Wah Choon Lee had been taken away?

A. Yes, sir.

Q. You didn't notice it when you ran up to the door? A. No, sir.

Q. This mat is one of those metal things to scrape your mud off? A. Yes, sir.

Q. That is the kind you buy down at Lewers & Cooke, [394] from Lewers & Cooke's establishment?

A. You can buy them in any hardware store.

Q. Isn't it a fact, Mr. Caminos, you did not even know what happened to Wah Choon Lee until Captain Levi called you back there?

A. Yes, sir, that is right.

Q. You didn't know what happened?

A. I didn't know what happened.

Q. And when you saw Burns standing by the living room door when you opened the door, you say Burns had his undershirt on?

A. I am sure he had his undershirt on. I am sure of that.

Q. And you are positive now, Mr. Caminos, that when you saw Mrs. Warren you said to her, "You are under arrest; you know what it is all about?"

A. Yes, sir.

Q. Your statement that you made on January 29th to the effect that you told "Speed" to come along with you because the girls had gotten away is not true?

(Testimony of Clarence C. Caminos.)

Mr. Young: It is not shown that the witness made that statement. I object to it.

Mr. Dwight: Withdrawn.

The Court: Objection will be sustained. Objection withdrawn.

By Mr. Dwight:

Q. Do you recall making that statement?

A. After she was placed under arrest she asked me to get dressed. I allowed her to get dressed. After I was about to go to the Police Station at Wahiawa, then I told [395] her to come along.

Q. You told her twice; once you told her she was under arrest and the next time you told her that she was to come along with you?

A. After she got dressed I told her to come along; after she was arrested she did not want to come out in the clothes she was in.

Q. When the door was opened you talked to "Speed" Warren? A. Yes, sir.

Q. After that conversation she asked to get dressed? A. Yes, sir.

Q. She started up the stairs? A. Yes, sir.

Q. You sent a police officer up there?

A. Yes, sir.

Q. As far as you know, what was the name of that officer? A. Officer Yuen.

Q. Officer Yuen went up there and as far as you know accompanied "Speed" until she came down dressed and went with you to the Police Station? A. Yes, sir, and also Officer Burns.

(Testimony of Clarence C. Caminos.)

Q. Also Officer Burns? A. Yes, sir.

Q. When did you first know that Wah Choon Lee was dead?

A. When I arrived at the police headquarters at Wahiawa.

Q. How long afterwards?

A. It might have been twenty minutes afterwards; I couldn't exactly say. [396]

Q. Did you learn where he died? A. No, sir.

Q. Don't you know he died at the hospital?

A. I couldn't say he died at the hospital. The only instructions I got were from Captain Kalauli that he had passed away; that he died at the hospital or on the way to the hospital. That I couldn't say.

Q. Now, when the man was lying down on the ground, did you let him lie there, he was sitting up or what?

A. Part sitting up, leaning against Captain Kalauli's hands; he had hold of him at the back.

Q. He was sitting up?

A. Well, about forty-five degrees, lying this way (demonstrating).

Q. Is that the first raid that Wah Choon Lee had ever been on to your knowledge?

A. No, sir.

Q. Now, Mr. Caminos, isn't it a fact that you sent Burns in to try to make a case of prostitution?——

(Testimony of Clarence C. Caminos.)

Mr. Young: Objected to as being asked and answered about three times. It was put in the same way about three times.

Mr. Dwight. Let me finish my question. (To the Reporter) Can you give me the half?

(The unfinished question was read.)

By Mr. Dwight:

Q. (Continuing) and when you, under your instructions to him when he had the three *dollas* marked money given to the girl, his clothes undressed, he was to blow the whistle and you were to come in? Isn't that the fact? [397]

A. My instructions was never given to Burns to have his clothes taken off.

Q. Well, we will put his clothes back on.

A. My instructions was this, when he got into the house and he felt that he had evidence enough to make an arrest to blow his whistle; that we would come in to assist him.

Q. Then you deny that you sent him in there to get what he would consider sufficient evidence, then to blow the whistle so you folks could make the arrest?

A. If he had evidence enough, to make the arrest, then notify us by blowing the whistle.

Q. Then you would make the arrest?

A. No, he make the arrest and we come in to assist.

(Testimony of Clarence C. Caminos.)

Redirect Examination

By Mr. Young:

Q. You stated when you came into the walk you stated that you were police officers?

A. Yes, sir.

Q. Did you state that more than once?

A. Twice.

Q. What kind of voice did you say it in?

A. In a loud voice.

Q. That was before you reached the door?

A. Yes, sir.

Q. Now, the defendant here might have been convicted of some other crime that you might not have known, is that correct? A. Yes, sir. [398]

Q. You are only testifying from what you know? A. Yes, sir.

Q. And you stated on cross-examination, I believe, that you didn't know what happened to Wah Choon Lee until you looked back? A. Yes, sir.

Q. And everything you have testified to about seeing him you actually saw that and that is correct? A. Yes, sir.

Q. And everything you have testified to here is the truth and nothing but the truth?

A. Yes, sir.

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial. He is presumed to be telling the truth.

The Court: Objection overruled.

(Testimony of Clarence C. Caminos.)

Mr. Young:

Q. Objection overruled. What say you?

A. To the best of my knowledge that was the truth what I stated before you gentlemen.

Mr. Young: No further redirect examination.

Mr. Dwight: May I be permitted to reopen cross-examination for just one question?

The Court: You may.

Cross Examination

(Continued)

By Mr. Dwight:

Q. Referring, Mr. Caminos, to this sisal tree over here (indicating on Ex. "A"), what side of that sisal tree were you standing on? Come down here.

A. Stepping down to Ex. "A" and (indicating) I was standing about here (indicating) to the sisal tree. [399]

Q. Well, indicate.

A. Right here (indicating on Ex. "A"); right close, on the outside.

Q. On the outside of the sisal tree?

A. Yes, sir.

Q. From that point on the outside of the sisal tree can you see the front door of Mrs. Warren's house? A. Yes, sir.

Q. You ever notice this high hedge over here (indicating on Ex. "A")? A. Yes, sir.

Q. Does that interfere with your view?

(Testimony of Clarence C. Caminos.)

A. If I was standing there, I could not see, but if I was kneeling down I could see.

Q. Now, you are kneeling down?

A. There were times I was standing and times I was kneeling.

Redirect Examination

By Mr. Young:

Q. Have you observed this place since that time? A. No, sir.

By a Juror (Mr. Kinney):

Q. About this metal plate on the door, is it flush, thick or thin, or has a place to grab?

A. Yes, on this part it is tacked (indicating on Ex. "L"); window (indicating); on this part it is loose (indicating).

Q. It is thin? A. It is thin.

Q. But loose? [400] A. Loose on the top.

Q. Loose enough——

A. Loose enough that you could put your fingers in.

By the Court:

Q. What material is that made out of, if you know?

A. I would say a copper sheet, copper metal.

Recross Examination

By Mr. Dwight:

Q. You did not know it was a copper sheet until you saw it down at the Police Station?

(Testimony of Clarence C. Caminos.)

A. Why I saw it was a copper sheet, I noticed it was brown.

Q. Didn't you see it down at the Police Station? That is why you knew it was?

A. No, at the home after the thing happened.

Q. A few hours afterwards?

A. A few minutes after that.

The Court: Any further questions?

By Mr. Dwight:

Q. Didn't you know that that door was painted brown on the outside? A. No, sir.

Q. Haven't you looked at it down there at the Police Station?

A. I admit I noticed the door at the evidence room.

Q. Haven't you noticed it was painted brown?

A. No, sir.

Q. But you knew it had a brown color?

A. I couldn't say it was painted brown; to the best of my knowledge at that time, I thought it was a copper [401] sheet, metal sheet, just like you see.

Q. You used your flashlight to find that wire?

A. I used my flashlight. I flashed it on the hinge. I noticed there was an electric wire soldered on the top part of the hinge.

Mr. Dwight: That is all.

By a Juror (Mr. Kuhlman):

Q. What way does the door swing, looking out?

A. It swings out.

(Testimony of Clarence C. Caminos.)

Q. That is, if you are in the house, it swings out, looking away? A. Yes.

Q. Looking at the door, looking in, which side of you are the hinges? A. On my left now.

Reredirect Examination

By Mr. Young:

Q. To your best recollection, this appears to be a copper plate? A. Yes, sir.

Q. And you don't recall seeing any paint?

A. No, sir.

The Court: Any jurors have any questions?

By a Juror (Mr. Borden):

Q. How would this door open shown on this picture (referring to Ex. "H")?

A. I am facing towards the door; the door opens out this way (indicating). If I was inside, then it would open out towards my right (indicating on Ex. "H").

The Court: That is all. Witness excused. [402]

Mr. Young: Does your Honor desire any recess?

The Court: I would prefer to go until quarter to twelve.

Mr. Dwight: Take a five-minute recess. I have *have* been going steady.

The Court: Court will take a short recess.

(A brief recess was taken.)

Mr. Dwight: May it please the Court, as I was leaving the Reporter's office several of the jurors stated that they would like to view the place and I want to report that to the Court at this time.

Mr. Young: I think it is improper for counsel to take a communication from the jury in the absence of this Court. The proper time has not come for that. Counsel should not communicate this request. I submit it is improper procedure.

Mr. Dwight: That is what I term chicken feed, made here for what purpose. The jurors have a right to question the witness; they have a right to come in here; they have a right to view the place. As I was rushing in from Mr. Clark's office, they said they would like to see the place. I said, "All right." I came right in and communicated it to counsel.

Mr. Young: I have no objection but just as an officer it is not the practice for any attorney to communicate with the jury. I am not criticizing the attorney. This is not the right procedure.

Mr. Dwight: I did it because it was my duty. [403] It was proper for me to do it. If I withheld it, then I would be violating my oath. I ask counsel's remarks be expunged from the record as prejudicial to the defendant.

The Court: The Court will disregard any remarks by either attorney in this respect and expunge them from the record. Any of you have any objection?

(There were none.)

Mr. Young: This is not the right time to take this up. I haven't finished my case.

The Court: The Court will keep that in mind. At some convenient time we will on this request view the premises.

Mr. Young: May this exhibit be received, the diagram that the Captain drew?

The Court: Any objection?

Mr. Dwight: My general objection. It is only packing the records with a lot of useless papers, therefore immaterial.

Mr. Young: I object to counsel's remarks.

The Court: The Court overrules the objection.

Mr. Young: I ask the jury be instructed to disregard the remarks of counsel and comment upon any of the evidence, other than his answer.

Mr. Dwight: May counsel's request include also his remarks?

The Court: The jury will disregard all arguments or counsel; disregard them and forget them and keep your attention on the evidence and the law. [404]

Mr. Young: Has the witness been sworn?

The Court: Not that I know of.

FRANCIS APOLIONA,

called as a witness for the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Francis Apoliona.

Q. What is your occupation?

A. I am a policeman stationed at Wahiawa.

Q. Were you a policeman on August 3, 1937?

A. I was.

Q. Do you know Wah Choon Lee? Did you know Wah Choon Lee? A. Yes.

Q. And who is he?

A. He was a policeman assigned to the vice squad.

Q. Did you see him on that date? Do you recall August 3rd?

A. Yes, sir, I saw him in the Wahiawa Station.

Q. You saw him in the Wahiawa Station?

A. I saw him in the Wahiawa Station.

Q. Did you go any place with him that night?

A. That night Wah Choon Lee in company with six other police officers went on a raid to "Speed" Warren's place.

Q. Where did you go?

A. I was stationed on Kuahiwi Street in the back of [405] "Speed" Warren's house on the road there, to cover anybody there that left the premises.

Q. Was anyone else there with you?

(Testimony of Francis Apoliona.)

A. Officer Chun was there with me.

Q. Officer Chun. Now, while you were there, did you do anything, hear anything or see anything?

A. Well, at about nine o'clock, or a little before or a little after, I heard a police whistle and I was instructed——

Mr. Dwight: Objected to, and move to strike anything he has to say about his instructions.

The Court: Nothing to strike so far.

Mr. Dwight: I object to any hearsay going in.

The Court: Exclude from your testimony any statements made to you by anyone, unless it is in the presence of the defendant.

By Mr. Young:

Q. Now, you heard the whistle blow?

A. Yes, sir.

Q. Did you do anything?

A. I ran into the yard to cover the place.

Q. Whose yard?

A. "Speed" Warren's yard.

Q. What did you do after you got there?

A. I stayed in the back to see that nobody left the place.

Q. Did you see anything?

A. No, sir, I did not see anything.

Q. Did you see anybody? A. I did not.

[406]

Q. Just stayed in the back? A. Yes, sir.

Q. Did you see Wah Choon Lee? A. Yes, sir.

(Testimony of Francis Apoliona.)

Q. Where did you see him next?

A. I saw him at the front, right at the hedge, when I came for him with another officer.

Q. What was he doing?

A. Lying on the ground.

Q. Did you do anything with respect to him?

A. I picked him up and put him in a car and took him to the hospital.

Q. What part of the car was he put in?

A. Back seat.

Q. Who got in the back seat? A. I got in.

Q. Was he conscious or unconscious?

A. I am not qualified to make any statement but I can say he was warm. As we proceeded to the hospital he proceeded to get cold.

Q. Before you got to the hospital was he cold?

A. Yes.

Q. What hospital are you talking about?

A. Post Hospital.

Q. How long did it take you to get there?

A. Five minutes.

Q. What did you do when you got to the Post Hospital?

A. We got him off the car and saw the doctor.

Q. Will you know that doctor if you saw him?

Mr. Dwight: We will admit that. [407]

Mr. Young: Will you admit that is Doctor Taylor who is outside?

Mr. Dwight: Yes, sir.

(Testimony of Francis Apoliona.)

By Mr. Young:

Q. You delivered the body of Wah Choon Lee to Doctor Taylor? A. Yes, sir.

Q. Did you do anything else?

A. We stayed around and I collected his property.

Q. Did you see anything that happened in front of this house after the whistle blew?

A. No, sir, I was in the back all the time.

Cross Examination

By Mr. Dwight:

Q. Did you see Caminos come around the back?

A. No, sir.

Mr. Dwight: I have no further cross-examination.

The Court: That is all. Excused.

Mr. Young: Doctor Taylor, please.

JAMES S. TAYLOR,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Captain James S. Taylor.

Q. You are attached to the Army?

A. Medical Corps.

(Testimony of James S. Taylor.)

Q. You are attached to the Army Medical Corps. You [408] are a duly licensed doctor, physician and surgeon? A. I am.

Mr. Young: Do you admit the doctor's qualifications?

Mr. Dwight: I will admit the doctor's qualifications.

The Court: Let the record so show.

By Mr. Young:

Q. There is evidence, the last witness testified that he delivered a body to you of a male on August 3, 1937, sometime in the evening. Did you see this witness that just left the stand?

A. Yes, sir, as I came in the door.

Q. Do you recognize him?

A. He was one that brought the body to me at the hospital.

Q. Did you look at that body after it came in there? A. Yes, sir, after it came in.

Q. Was the person dead or alive when you saw him?

A. The person was dead when I saw him. It was immediately after I saw him.

Q. At that time what time was that?

A. 9:20 p. m.

Q. When was that? A. August 3, 1937.

Mr. Young: No further questions. Thank you, doctor.

Mr. Dwight: That is all, doctor. [409]

KAM YUEN,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Kam Yuen.

Q. And what is your occupation, Mr. Yuen?

A. Police Officer.

Q. City and County of Honolulu?

A. Yes, sir.

Q. You are a duly commissioned police officer?

A. Yes, sir.

Q. How long have you been a police officer?

A. About six months.

Q. About how long? A. Six months.

Q. Six months? A. Yes, sir.

Q. Where do you live in town?

A. 1134 Gulick Avenue.

Q. Were you a police officer on August 3, 1937?

A. Yes, sir.

Q. Do you recall whether on that date you had any special duty? A. Yes, sir.

Q. What was that duty?

A. To go in that raid.

Q. Who was the head of the raid? I mean what officer, what police officer was in charge of you in it. A. Captain Caminos.

Q. And where did you first see him that day?

[410]

(Testimony of Kam Yuen.)

A. At the Wahiawa Court House.

Q. And where did you first receive your instructions as to this raid?

A. At the Wahiawa Court House.

Q. Did you accompany any officer at any place?

A. Yes, sir.

Q. Where did you go? Will you please tell this jury?

A. From the Wahiawa Court House we left the court house to "Speed" Warren's.

Q. You went to "Speed" Warren's place?

A. Yes, sir.

Q. Did you go to "Speed" Warren's place?

A. We did.

Q. What part of the house did you go to?

A. At the front.

Q. Who was with you, if anyone?

A. Captain Caminos, Captain Kalauli, Officer Wah Choon Lee and I.

Q. Now, where *where* you just before you went to the front door of the house, just immediately before? A. Who do you mean, Wah Choon?

Q. No, you. A. Please repeat the question.

Q. Where were you just before you—I will withdraw the question, your Honor. Who all went to the front door of the house?

A. The two captains, Wah Choon and I.

Q. Who got to the door first?

A. Captain Caminos and Wah Choon.

Q. And where were you? [411]

(Testimony of Kam Yuen.)

A. Right in the back of them.

Q. Now, while you were standing— Now, while you were at the door did anything happen there when you got to the door? A. Yes, sir.

Q. Will you please tell us what you saw or heard?

A. Well, when we got to the door Captain Caminos announced that we were police officers and asked "Speed" to open the door. The door was being opened. We heard a scuffling sound in there, that is, one of the officers was in there having a little trouble with "Speed".

Mr. Dwight: Well, I am going to move to strike that answer as purely the conclusion of this witness.

Mr. Young: I have no objection to it being stricken.

The Court: That may be stricken.

By Mr. Young:

Q. Do you know of your own personal knowledge what was going on in there? A. Yes.

Q. That it was "Speed" and the officer?

A. Yes.

Q. How do you know that?

A. When the door opened "Speed" was the only one there.

Q. When the door opened you saw the officer?

A. Yes, I recognized Burns.

Q. As far as "Speed" was concerned, did you know whether or not that was she before the door opened? A. No, sir.

(Testimony of Kam Yuen.)

Q. You did not. You just suppose that because [412] when the door opened you saw her?

A. That is my conclusion.

Mr. Young: I have no objection to that being stricken.

Q. You say that Caminos announced you were police officers and opened the door, something to that effect? A. Yes, sir.

Q. What, if anything, happened before that on the outside?

A. He started to kick the door. Captain Caminos noticed the door opened outward. He told him not to kick so Officer Lee grabbed hold of the door and started to pull the door.

Q. Will you show just how Officer Lee grabbed that door?

A. There is a metal plate on the door.

Q. I will refer you to Prosecution's Exhibit——

Mr. Dwight: He can testify from his own recollection.

A. Anyway, the top of the plate is about this high. I saw him reach up with both hands and try to pull the door out. (demonstrating)

By Mr. Young:

Q. You saw him grab like that? A. Yes, sir.

Q. What happened, if anything?

A. He let out a scream or yell.

Q. Then what? A. He fell backwards.

Q. Did you see where he fell? A. Yes, sir.

[413]

(Testimony of Kam Yuen.)

Q. Where did he fall?

A. Into Captain Kalauli's arms.

Q. Captain Kalauli caught him?

A. Yes, sir.

Q. Where were you standing at this time?

A. Right back of Captain Caminos.

Q. Back of Captain Caminos? A. Yes.

Q. Did you touch that door at any time whatever? A. No, sir.

Q. Before the deceased touched it, Wah Choon Lee? A. No, sir.

Q. Then after the deceased, Wah Choon Lee, fell back, what happened, if anything?

A. The door opened.

Q. The door opened? A. Yes, sir.

Q. What did you see, if anything?

A. I saw "Speed" Warren standing right at the opening.

Q. Which way did the door open, in or out?

A. Opens out.

Q. Opened out? A. Yes, sir.

Q. Now, do you know what kind of surface Wah Choon Lee was standing on at the time?

A. There is a metal mat there.

Q. What kind of a metal mat?

A. One of those door mats, that is, mat of metal, iron.

Q. Where was that mat located with reference to the [414] door?

A. At the foot of the door on the outside.

(Testimony of Kam Yuen.)

Q. Was Wah Choon Lee standing on that?

A. Yes, he was.

Q. When was he standing on that?

A. At the time he arrived, at the time he reached the door.

Q. When he grabbed that plate?

A. Yes, when he grabbed that plate until he fell.

Q. Now, after the door opened, did you go inside the house? A. Yes, I did.

Q. And what did you do, if anything?

A. Well, Captain Caminos ordered me to assist Officer Burns, so I went in and I asked Burns if he needed any help.

Q. Did you know the defendant, "Speed" Warren? A. I didn't know her.

Q. Would you know her if you saw her again? Have you ever seen her before? A. Yes, I have.

Q. Did you see her there that night?

A. Yes, I did.

Q. Is she in Court now?

A. I wouldn't recognize her now. I haven't seen her for so long.

Q. Do you know—I withdraw the question. Did you at any time go upstairs that evening?

A. Yes, sir, I did.

Q. Did you go upstairs with anybody? [415]

A. No, I went alone.

Q. Was anyone upstairs when you got up there?

A. A couple of soldiers and "Speed" Warren.

Q. Was "Speed" Warren up there?

(Testimony of Kam Yuen.)

A. Yes, sir.

Q. What did you do, if anything, up there?

A. Well, Captain Caminos asked me to go up there and bring that woman down, so I went up there to look for the woman.

Q. What woman did he tell you?

A. He didn't tell me. He said a woman ran upstairs.

Q. Do you know anything else about this incident out there?

A. What is that question?

Q. I will withdraw the question. Did you finally come down from upstairs? A. Yes, I did.

Q. What did you do then?

A. Stand guard at the premises.

Q. Stand guard at the premises? A. Yes.

Mr. Young: No further questions.

Cross Examination

By Mr. Dwight:

Q. What do you mean by "standing guard"? What did you do?

A. We couldn't find the woman. I stayed at the front entrance to see that nobody escaped.

Q. You mean out in the street? [416]

A. No, in the yard.

Q. You stood on the walk?

A. On the lawn.

The Court: It is now twelve o'clock.

(Testimony of Kam Yuen.)

Mr. Dwight: Just a moment. At this time may we take a continuance until tomorrow morning on account of the condition of the defendant.

The Court: Any objection?

Mr. Young: Your Honor knows the situation. I submit whatever your Honor's ruling is agreeable to the Territory.

Mr. Dwight: May I suggest this, that before the jury is dismissed for the day that we make some arrangements about going out to view the premises. I would suggest tomorrow morning.

Mr. Young: If your Honor please, my same objection is in order. I have a right to finish my case before the jury is allowed to go to the premises. This is my objection: Counsel has no right in the middle of my case to step up and make any statement. When I have rested he may.

Mr. Dwight: May it please the Court, this Court conducts the trial and not the prosecuting counsel, but this Court can say when we can go and view the premises. The practice of this Court has been to view the premises at the most convenient time. They have viewed premises after all the evidence has been in. I just suggest, tomorrow being Friday, we could use up tomorrow morning. [417]

The Court: Let us take up this continuance.

Mr. Dwight: Upon the grounds already stated and the affidavit of the doctor.

The Court: She is ill now?

Mr. Dwight: I have just determined that fact.

(Testimony of Kam Yuen.)

The Court: All right, the Court will continue the matter until nine o'clock tomorrow morning for the reasons stated by Mr. Dwight and letter of the doctor. The jury is excused until that time. The witness is also ordered to be back here tomorrow morning at that time.

Mr. Dwight: Will the Court take up the matter of viewing the premises?

The Court: The Court will not order a view at this time. Take it up later. In addition to the reason advanced by Mr. Dwight of the sickness of the defendant Warren, the Court was informed by one of the jurors that Juror Roberts was also sick and suffering from influenza. For these two reasons the Court grants the motion to continue. Report tomorrow morning at nine o'clock for further trial of this case. The jury is under the same instructions.

(A recess was taken until Friday, February 11, 1938, at nine o'clock a. m.) [418]

Honolulu, T. H., Feb. 11, 1938.

(The trial was resumed.)

The Clerk: Criminal 14,332 Territory of Hawaii vs. Ilene Warren alias "Speed" Warren.

Mr. Young: Ready for the Territory. Stipulate the defendant and the jury are present, your Honor.

Mr. Dwight: I will so stipulate, your Honor.

The Court: Ready for the defense?

Mr. Dwight: Ready.

The Court: Let the record so show. Proceed with the examination of Mr. Yuen.

KAM YUEN,

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Young:

Q. Mr. Yuen, you testified on direct examination something about the door that you saw Wah Choon Lee touch? A. Yes, sir.

Q. Would you know that door if you saw it again? A. Yes, I would.

Mr. Young: May I have Prosecution's Exhibit "H" for identification?

Mr. Dwight: May I have my same objection to the exhibition of that door to the witness?

The Court: There is no offer in evidenc.e

Mr. Dwight: I object to the admission.

The Court: Let the record show there is no exhibition of this exhibit to the jury.

Mr. Dwight: I mean exhibition to the witness, [419] for the reason this Court has already ruled that the evidence is absolutely inadmissible. I object to counsel exhibiting inadmissible secondary evidence to the witness.

(Testimony of Kam Yuen.)

The Court: Objection overruled. This exhibit, it is not in evidence, merely for identification, not shown to the jury.

Mr. Dwight: Exception.

The Court: Exception noted.

By Mr. Young:

Q. Will you take a look at Prosecution's Exhibit "H", marked for identification?

(Mr. Young handed the picture, Prosecution's Exhibit "H" for identification to the witness.)

Q. Do you know what that is?

A. The front door to—door of Ilene Warren's home.

Q. That is the way it looked on the night Wah Choon Lee grabbed the door? A. Yes.

Mr. Young: I offer this in evidence, if the Court please.

Mr. Dwight: May the Court reserve ruling until after I have made my cross-examination?

The Court: Then, cross-examine.

Cross Examination

By Mr. Dwight:

Q. Mr. Yuen, you say you were up in the Police Station at Wahiawa with Officers Kalauli, Captain Caminos and Burns prior to the time you went to "Speed" Warren's house? A. Yes. [420]

Q. And you listened in to the conversation between Caminos, Burns, yourself and the other offi-

(Testimony of Kam Yuen.)

cers about what you were supposed to do and what Burns was supposed to do? A. Part of it.

Q. You didn't hear all the instructions?

A. I heard all of the instructions.

Q. You heard all of it?

A. Instructions, I heard all of it; you said conversations.

Q. Wasn't there instructions in all the conversation? A. Yes.

Q. How did you get your instructions?

A. By conversation.

Q. You heard that conversation, did you?

A. Yes, I did.

Q. Where was Burns, was he sitting close to you at the time that you folks discussed this matter?

A. Quite close.

Q. Was Caminos sitting close to you?

A. Yes.

Q. Captain Kalauli? A. Yes.

Q. You heard everything that Caminos said?

A. Yes.

Q. You heard everything that Burns said?

A. Yes.

Q. Now, was anything said at that conversation about not having a search warrant?

A. No. [421]

Q. You recall Captain Kalauli telling Captain Caminos that he had no right to raid without a search warrant? A. No.

(Testimony of Kam Yuen.)

Q. You deny that statement was made?

A. I did not hear it.

Q. You didn't hear it? You don't know whether it was made or not? A. No.

Q. Now, what did you hear Caminos tell Burns to do? A. I don't quite remember.

Q. You don't remember?

A. It has been seven months since.

Q. Never mind looking at counsel. You have no recollection at all of what Caminos told Burns up in the Police Station? A. No.

Q. Did you hear anybody tell Burns anything up there in the Police Station?

A. Captain Caminos and Captain Kalauli.

Q. You heard Captain Caminos and Captain Kalauli tell Burns something? A. Yes.

Q. What did Captain Caminos tell Burns?

A. I don't remember.

Q. And you don't remember what Captain Kalauli told Burns? A. No.

Q. What did Captain Caminos tell you?

A. Well, to go with him.

Q. To go with him? [422]

Q. You didn't hear anybody tell Burns to go into the house? A. Somebody did.

Q. You don't know who said it?

A. Captain Caminos, I believe; I am not sure.

Q. You heard somebody tell Burns that?

A. Yes.

(Testimony of Kam Yuen.)

Q. What did they say to Burns?

Mr. Young: Object to this as being incompetent, irrelevant and immaterial, not a proper foundation for this statement. Counsel does not know who made the statement; furthermore, this is all hearsay.

Mr. Dwight: It all goes to what counsel has been getting at.

Mr. Young: This is a fishing expedition.

Mr. Dwight: I move to strike the remarks of counsel. This is legitimate cross-examination.

The Court: The jury is instructed to disregard the remarks of counsel.

(The last question was read.)

By Mr. Dwight:

Q. What was the language said to Burns?

A. They spoke in English.

Q. Now, what were the words used?

A. I don't remember.

Q. You remember it was telling Burns to go into the house?

A. Yes, I have a recollection.

Q. Have you any recollection as to what Burns was [423] to do inside the house? Was there any conversation in that regard? A. Yes.

Q. Well, who did the talking?

A. The two Captains.

Q. Caminos? A. And Kalauli.

Q. Do you remember what Mr. Caminos said?

A. I don't remember exactly.

(Testimony of Kam Yuen.)

Q. Well, the substance of it, if you don't remember exactly, the substance of it?

A. Officer Burns was to give the signal when he was ready in there.

Q. Officer Burns was to give the signal when he found an offense committed in there?

A. Then he is to give the signal, which is a blast by his whistle.

(The last answer was read.)

Q. Was there any conversation about the nature of the offense, the crime that he was to blow his whistle for?

A. I don't quite remember that.

Q. You don't remember that? A. No.

Q. What in the world were you going down to "Speed's" for when you left the Police Station? What did you have in your mind?

A. Going on a raid.

Q. Going on a raid. You were going along to raid a person's house and you did not have a search warrant?

A. I don't know. I was going under instructions of [424] Captain Caminos and Captain Kalauli.

Q. All right. In other words, did you hear anything about planting three marked dollars on anybody? A. I don't remember.

Q. Did you see the three marked dollars?

A. I didn't; I haven't seen any money.

Q. Did you see any money passed between Captain Caminos and Officer Burns? A. No.

(Testimony of Kam Yuen.)

Q. You were present all the time?

A. Yes.

Q. And you were with Caminos all the time from the time you left the Police Station up to the front door of "Speed" Warren's house? A. Yes.

Q. You never saw Caminos give Burns three marked dollars? A. No.

Q. Or give him any instructions in that regard?

A. No.

Q. Did you hear Mr. Caminos say anything about taking off his clothes?

A. I didn't hear anything.

Q. Did you hear any specific instructions from Caminos not to have intercourse with anybody in that house? A. I don't remember.

Q. You were listening? A. I was.

Q. You were detailed to take part in this raid?

A. Yes. [425]

Q. You were listening to the instructions of Captain Caminos? A. Yes.

Q. And you don't remember any of that conversation? A. No.

Q. Now, Mr. Kam Yuen, where did you leave Mr. Burns, you and Caminos together part company with Mr. Burns on that night?

A. Muliwai Street at the railroad track.

Q. Muliwai Street at the railroad track?

A. Yes.

(Testimony of Kam Yuen.)

Q. You are familiar with this map—I think counsel has shown it to you—this map of Wahiawa. You never seen this map before (referring to Ex. "A")? A. No.

Q. This is Muliwai Avenue (indicating on Ex. "A"); this is the place that has been identified as Mrs. Warren's home (indicating) "D"; you say you and Caminos and Burns parted at the railroad track here (indicating on Ex. "A")? Pardon me; I made a mistake. That is not Muliwai Street.

A. At the railroad track, the street next to the court house.

Q. You are sure when you and Caminos and Kam Yuen got to this point (indicating)—I withdraw this question. You came up from the Police Station along this, the lower avenue (indicating on Ex. "A")? A. Yes.

Q. When you got to this point (indicating) you say Burns, Caminos and you separated?

A. Burns separated from us. [426]

Q. And you came around this way (indicating on Ex. "A")? A. Yes.

Q. You and Caminos? A. Yes.

Q. How did Burns go?

A. Via the railroad track.

Q. Burns went up the railroad track?

A. Yes.

Q. Are you absolutely sure?

A. No, not absolutely sure.

(Testimony of Kam Yuen.)

Q. All I want is your definite reaction. All I want is the truth. A. I don't quite remember.

Q. Then did you come back over here with Caminos (indicating on Ex. "A")? A. Yes.

Q. Where did you stand in relation to Caminos? A. Well, just back of him.

Q. Just back of him. When you say "back of him", in what part of this area where you were standing? Will you come down here and indicate it, or maybe I can indicate it if you can see the map?

A. (Stepping down and indicating on Ex. "A") Somewhere right here.

Q. You were somewhere in the vicinity of this little green thing that is drawn like a tree and marked "Sisal plant"? A. Yes.

Q. In relation to that tree, where was Caminos standing?

A. Well, I don't remember the tree; it was quite dark. [427]

Q. It was quite dark?

A. It was a hedge or bush.

Q. In relation to that hedge or bush, the same position that we are standing now?

A. About the same position.

Q. And where is the bush? Where was the bush?

A. The bush was on the lefthand side.

Q. What do you mean by the "lefthand side"?

A. On this side (indicating).

Q. The bush was on this side? (Indicating) You are sure about that? A. Yes.

(Testimony of Kam Yuen.)

Q. And Caminos was in front and you were behind? A. Yes.

Q. So you were about in this position? (Indicating) A. About that vicinity.

Q. About that vicinity, and from where you were standing could you see Burns as he came along the road? A. He went ahead of us.

Q. He went ahead of you and was he already in the yard before you got to the sisal plant?

A. I think he was.

Q. You think he was and you saw him? He went ahead of you, you say, and when you got to this sisal plant you say Burns was already in the yard?

A. I think so.

Q. You think so; you didn't see him in the street? A. No, I did not.

Q. Did you look down the street to see him?

A. No. [428]

Q. You didn't see anybody on the street. Did you draw that to the attention of Captain Caminos there was nobody on the street at that time?

A. No.

Q. Captain Caminos was ahead of you and you were both alert in seeing that there was nobody on the street? A. Yes.

Q. Then, Mr. Yuen, after you—when did you next see Burns?

A. In "Speed" Warren's home.

Q. You never saw Burns at all after that, after he got into the yard, until he was in "Speed" Warren's home? A. Yes, sir.

(Testimony of Kam Yuen.)

Q. And you didn't see him knock at the door?

A. I didn't.

Q. You didn't see him walk up the walk toward the front door?

A. I don't quite remember; maybe I did after all.

Q. Maybe you did, maybe you did not, but you didn't see Burns walk up to the front door?

A. I don't remember.

Q. But you do remember the next time you saw Burns, that was the last time that you saw Burns that we have been discussing in this series, was some place that you remembered down here by this road (indicating on Ex. "A"); that is the last time you saw Burns; that is your testimony, is that right?

A. Come to think of it, I think I did see him again afterwards.

Q. Where, where did you see him again after this [429] point here (indicating on Ex. "A")?

A. Going in the yard.

Q. Going in the yard? A. Yes, sir.

Q. When you say "going in the yard", what do you mean by that, what direction was he coming from when he was going into the yard?

A. Going toward the door, the front door.

Q. You saw him on the walk, walking in on this cement walk?

A. I am not sure; I think I did.

Q. You think he did?

A. I have a slight recollection of seeing him.

(Testimony of Kam Yuen.)

Q. You have a slight recollection of seeing him. Does that slight recollection tell you just what he was doing and where he was walking?

A. It doesn't; no.

Q. Then you didn't see him knock on the door; that is definite? A. I don't remember.

Q. You don't remember. Well, anyway, from where you were standing by the sisal plant, could you see the front door of "Speed" Warren's house?

A. No, because I wasn't standing.

Q. You were kneeling?

A. Sort of crouching.

Q. So was Caminos crouching?

A. I don't remember.

Q. You were right alongside of him?

A. Right back of him. [430]

Q. He was in front. In other words, he was ahead of you when you were looking towards the "Speed" Warren house? A. Yes.

Q. You don't remember whether he was crouching or standing? A. No.

Q. You couldn't see the front door?

A. I could see part of it.

Q. What part of the front door could you see?

A. There is a light shining there and I could see the upper portion.

Q. How were you seeing that, through this bush?

A. Yes.

Q. And when you say "the upper portion of the door", how much of the upper portion of the door could you see? Just indicate to the jury.

(Testimony of Kam Yuen.)

A. Oh, about this much (indicating on Ex. "H").

Q. Indicating a point about there (indicating on Ex. "H"). How far up would you say that is, Mr. Yuen?

Mr. Young: The jury can see it on the picture.

A. Approximately; I might see more, I might see less.

By Mr. Dwight:

Q. And that is all you could see from your crouching position?

A. What I could remember seeing.

Q. And while you were in this crouching position, were you talking to Caminos, just sitting and waiting, that is what you were doing, isn't it? Were you just sitting there with Captain Caminos, crouching, talking [431] and waiting, is that right?

Q. You were waiting for a whistle to be blown?

A. Yes.

Q. You weren't concerned with what was going on on the sidewalk or on the street or on the front door? A. No.

Q. You two were just waiting for a whistle to be blown? You were hiding and waiting for a whistle to be blown? That is correct, Mr. Yuen, isn't that right?

A. We were waiting for the whistle.

Q. Yes, that is what you folks were doing, hiding in these bushes and waiting for a whistle to blow, isn't that right?

(Testimony of Kam Yuen.)

A. I don't know whether they were hiding; I wasn't.

Q. Well, you certainly kept out of sight, didn't you? A. I did.

Q. You did, and your brother officer was alongside of you, keeping out of sight?

A. I can't say because I don't remember their position.

Q. And you were sitting there, waiting for a shrill police whistle, isn't that right? A. Yes.

Q. And was there any conversation up at the Police Station or on your way down here between Caminos and Burns and yourself about what that police whistle was for?

A. Sure, when the offense was committed in the house.

Q. When the offense was committed in the house. What offense?

A. I don't remember anything. [432]

Q. What is that?

A. I don't remember any mention of any definite offense.

(The last answer was read.)

Q. You don't remember anything about three dollars? A. I don't remember.

Q. No conversation at all about it in your presence? A. I don't remember.

Q. And there was no conversation at all in your presence about not having intercourse with anybody? A. I don't remember.

(Testimony of Kam Yuen.)

Q. And there was conversation in your presence there at the police station or on the road down about Burns not taking his clothes off?

A. I don't remember.

Q. You don't remember. Did the Chief talk to you before you left Honolulu?

A. Chief Gabrielson?

Q. Yes. A. No, I was stationed there.

Q. Were you present when the Chief talked to Mr. Caminos? A. No.

Q. You weren't? A. No.

Q. Now, Mr. Yuen, from the time that the— By the way, how many blasts of this whistle did you *y*ear? A. I think it was one.

Q. You think just one? A. Yes.

Q. And when you heard the whistle, what did you do? [433] A. We went forward.

Q. What do you mean by the "we"? Where do you get that "we"? A. I went forward.

Q. Anybody else go forward? A. No.

Q. You went with them? A. Yes.

Q. Who started to run first?

A. I don't remember.

Q. When you say they went, in what direction did you go? A. Toward the door.

Q. Toward the front door of Mrs. Warren's house? A. Yes.

Q. Did you go in a straight line or go up the street and turn in?

A. I don't quite remember.

(Testimony of Kam Yuen.)

Q. How did you run? You were in this position over here (indicating on Ex. "A"). Did you head in this direction to the front door or did you come around over here and go in here (indicating on Ex. "A")? A. I don't remember.

Q. You don't remember.

Q. In other words, you were excited when that whistle blew? A. I was not.

Q. You were not? A. No.

Q. Where was the deceased before that whistle blew? [434] A. With us.

Q. Right alongside of you?

A. I don't remember his exact position but he was somewhere around there.

Q. Close enough for you to see him?

A. Yes.

Q. Close enough for you to talk to him?

A. Yes.

Q. Was he also crouching and in the bushes?

A. I don't remember his position.

Q. You don't remember his position?

A. No.

Q. Now, you have no idea which way you came toward the door, whether you came straight in line with the light that you saw or whether you went around and came in this way (indicating on Ex. "A")? A. I don't remember.

Q. You say Mr. Caminos was ahead of you or behind you in racing to the door?

(Testimony of Kam Yuen.)

A. Probably in front.

Q. Well, do you know? A. No.

Q. You don't know? A. No.

Q. You don't know whether he was behind of your or in front of you? A. No.

Q. You don't know how he ran to the door?

A. No.

Q. But you ran pretty fast yourself? [435]

A. I don't remember.

Q. You don't remember. Do you remember walking to the door *water* that whistle blew?

A. No.

Q. Well, what did you do, run? A. Yes.

Q. You don't know how fast you ran?

A. No.

Q. And did you notice if your companions were also running, Mr. Yuen?

A. No, I did not notice them.

Q. You didn't notice that? A. No.

Q. Who got to the door first, do you remember?

A. I don't remember; I don't know.

Q. You don't know. Do you know which way the deceased ran from his hiding place to the front door? A. No.

Q. You don't. You don't know who got to the door first? A. No.

Q. And about how long did it take you to get to the door?

A. I can't say; a few seconds.

(Testimony of Kam Yuen.)

Q. You can't say; a few seconds. Well, how far away were you from that door when the whistle blew, in feet,—about the distance across this room?

A. I don't quite remember the distance.

Q. Well, can you give us the approximate distance, whether approximately the distance of this room, from that [436] side (indicating) to this side (indicating), the Waikiki to the Ewa side of this room? A. About that, slightly more.

Q. About that, slightly more.

Mr. Young: Slightly more, was that your answer? A. Yes.

By Mr. Dwight:

Q. How much more?

A. I can't tell you exactly in feet.

Q. And you ran to the door? A. Yes.

Q. Now, can you give me any idea of the number of seconds that it took you to get from where you were to the door? A. No, I can't.

Q. You can't. You said a few seconds a little while ago. You want to change that and withdraw that answer? A. No.

Q. What is that? A. No.

Q. You want to leave it this way, about a few seconds? A. Yes.

Q. You were crouched, ready, waiting for the whistle? A. Yes.

Q. As soon as the whistle blew, off you went for that door? A. Yes.

Q. That is exactly what happened?

A. Yes.

(Testimony of Kam Yuen.)

Q. And the distance that you ran was, you say, a [437] little bit further than from this wall, indicating the Waikiki wall of this court-room, to the Ewa wall of this court-room? A. Yes.

Q. You were already instructed——

A. Yes, sir.

Q. (Continuing) what you were to do inside? Get any instructions on that, what you were to do inside? A. To assist.

Q. What you were to do inside, what were your instructions? A. I don't remember.

Q. You don't remember your instructions?

A. No.

Q. What were you running to the door for?

A. Well, at that time I remembered my instructions.

Q. Oh, I see. You have forgotten them since then? A. Yes, sir.

Q. Were you a little bit frightened?

A. I don't remember.

Q. You don't remember. Were you a little bit excited at that time?

A. Not that I can remember of.

Q. Anyway you made a dash for the door?

A. Yes.

Q. About as fast as you could run?

A. Yes.

Q. And when you got there you saw—What did you see? A. The door was locked.

(Testimony of Kam Yuen.)

Q. You tried the door? [438]

A. I didn't.

Q. You didn't try the door?

A. I seen the other officers trying the door.

Q. What do you mean by "the other officers trying the door"? Were they trying to turn a knob, something like that?

A. No, they weren't trying the knob. I don't think there is any knob on that door.

Q. I am talking about your best recollection at the time you were closer up to the door and the door was closed.

A. When we got there the door was closed and Caminos——

Q. And Cominos——

A. (Continuing) Caminos hollered to "Speed" to "Open the door, we are police officers."

Q. How many times did he say that?

A. Three times, I believe.

Q. You heard that distinctly? You heard that, did you?

A. I heard that. I did not expect to count. I think it was three times.

Q. You remember that now definitely? You remember that? A. Yes.

Q. Now, what else do you remember definitely? You heard Caminos say, "Open up, police officers"? When did Caminos say that? Were you at the door when he said that?

A. No, I was slightly back of him.

(Testimony of Kam Yuen.)

Q. How many feet back?

A. Oh, about—I can't say exactly.

Q. Was Caminos standing when he said that or was Caminos running in, too? [439]

A. I don't remember whether he was standing.

Q. You were running when you heard that?

A. Yes.

Q. How old are you, Mr. Kam Yuen?

A. Twenty-two.

Q. How old is Caminos? A. I don't know.

Q. He is an old man? A. Yes.

Q. You have been in athletics before?

A. Yes.

Q. Track? A. Yes.

Q. In fact, you just left track a couple of years?

A. Yes.

Q. Anyway, you heard this yell, "Open up, "Speed", police officers"? A. Yes.

Q. You don't know where Caminos was when he said that?

A. I think he was in front of me.

Q. He was in front of you. You don't know whether he was moving towards the door or stationary? A. I don't remember.

Q. You don't remember. In relation to you, was he standing directly in front of the door,—Caminos, I am referring to Caminos—? Where you were standing, did he appear to be standing directly in front of the door? A. I don't quite remember.

(Testimony of Kam Yuen.)

Q. Do you remember where Wah Choon Lee was standing? [440]

A. At the time we got there?

Q. At the time you rushed up there, where was Wah Choon Lee standing?

A. I don't remember.

Q. You don't remember?

A. Next to Captain Caminos, on the side of Captain Caminos.

Q. Do you know what he was standing on, Captain Caminos, if anything, or could you see? Could you see what he was standing on when you went up there? A. Yes.

Q. What was Captain Caminos standing on?

A. There is a concrete walk; he was on the concrete walk.

Q. He was on the concrete walk?

A. There is also an iron mat there.

Q. Was Captain Caminos standing on that iron mat? A. I don't remember.

Q. And in your rush to the door you saw that Iron mat? A. Yes.

Q. You looked down and saw the iron mat while you were rushing to the door?

A. Not while I was rushing.

Q. When did you first learn of this iron mat, down at the Police Station?

A. When we got there.

Q. While you were rushing to the door?

(Testimony of Kam Yuen.)

A. Not while rushing.

Q. When? [441]

A. After we had reached the place.

Q. After you had reached the place sometime after the deceased fell back, isn't that correct?

A. Yes.

Q. So when you went up there you didn't see any mat? When you first went to the door you didn't see any mat? A. No, I did not.

Q. When you first saw Caminos standing at the door you didn't know there was a mat?

A. I don't remember.

Q. When you first saw Kam Yuen you didn't know there was a mat there? A. Wah Choon?

Q. Officer Wah Choon Lee, you didn't know there was a mat there? A. No.

Q. What did you mean by testifying on direct examination, Mr. Yuen, that you were positive that Wah Choon Lee was standing on the metal mat?

A. After he got his shock he doubled a couple of seconds. I saw him standing on the mat before he fell.

Q. When did he get the shock? What drew your attention to the fact he got this shock?

A. He let out a yell and he was sort of tottering for a couple of seconds; he was sort of unsteady on his feet.

Q. When, when he yelled? A. Yes.

Q. His feet crumpled?

A. Not that I can remember. [442]

(Testimony of Kam Yuen.)

Q. What happened? Describe that statement to the jury when you say, "he was sort of unsteady on his feet".

A. He let go of the door; he was sort of swaying.

Q. You get up and demonstrate.

A. (Standing and demonstrating) You see, when he let go of the door, he sort of swayed backwards a couple of seconds—when I looked down I saw the mat—and he fell backwards.

Q. Did you see him shaking like this (demonstrating)? A. No.

Q. From the time that he yelled and fell back, he didn't shake?—— A. No.

Q. (Continuing) and fall back?

A. Not that I remember.

Q. How many feet away from him were you?

A. A few beyond.

Q. How many?

A. I don't remember exactly.

Q. There was a light burning a few feet, right above you? A. Yes.

Q. Now, did he fall into your arms?

A. No.

Q. He went back?

A. Somehow Captain Kalauli caught him there. He fell in Captain Kalauli's arms and Captain Kalauli caught him.

Q. Now, Captain Kalauli—Now, what did Captain Kalauli do when he fell back? [443]

A. He was shaking him, I think.

(Testimony of Kam Yuen.)

Q. What is that, he shook him?

A. He shook him.

Q. He shook him around the neck, like this (demonstrating)?

A. I don't remember where. Anyway, Captain Kalauli was trying to do something for Wah Choon.

Q. Did anybody give him the old exercise, like when you get knocked out in a football game?

A. Captain Kalauli was trying to bring Wah Choon to.

Q. By shaking his head and slapping him?

A. I don't quite remember.

Q. You talked to Wah Choon Lee after he fell back? A. No.

Q. You didn't even handle him at all? You let him go?

A. Just then the door opened and I was ordered in to assist Officer Burns.

Q. I see. What do you mean by "ordered in to assist Officer Burns"?

A. Captain Caminos detailed me.

Q. What did Captain Caminos tell you?

A. To go in and assist Officer Burns.

Q. That is all he told you?

A. All that I can remember.

Q. Did he tell you anything what you were supposed to do when you got inside the house when you folks were up the Police Station?

A. I don't remember.

(Testimony of Kam Yuen.)

Q. You don't remember. When he said "Go in and [444] assist Officer Burns" you want the jury to understand that?

A. I went in there to assist Officer Burns.

Q. When you went in to assist Officer Burns, Officer Burns was standing?

A. I found him in the room there.

Q. What side when the door opened? Where was Officer Burns? A. I don't remember where.

Q. Did you look in the front door?

A. I did.

Q. Where was "Speed" Warren?

A. Standing by the door.

Q. Who opened the door? A. I did not.

Q. "Speed" Warren was by the door. You didn't even see Burns? A. No, I didn't.

Q. There was no fight between Burns and "Speed" at the time you saw them? A. No.

Q. You went in to assist Burns when there was no fight? A. No.

Q. No. What did you have in your mind when you went into that door to assist Burns?

A. Well, I thought probably he was injured; he was unconscious.

Q. Probably he was injured; he was unconscious; you thought that when you didn't see him right in front of you, standing at the door?

A. No. [445]

Q. Anyway, you went into the room and you found Burns? A. Yes.

(Testimony of Kam Yuen.)

Q. You found he was entirely safe and sound in body and mind?

A. He was all right, yes.

Q. Then what did you do?

A. Then I was detailed by Captain Caminos to go upstairs.

Q. You were detailed by Captain Camin*i*s to go upstairs to do what?

A. When I found Officer Burns safe and sound, Captain Caminos came in and he asked me to go upstairs and bring that woman down.

Q. When did Captain Camin*i*s come in, if he ever came into that house that night?

A. I don't remember when.

Q. Did you see Captain Caminos ever go into that house that night? A. Yes, sir.

Q. When? A. I don't remember when.

Q. I am speaking now of the time that the door opened. You remember that, don't you?

A. Yes.

Q. When at that time did you see Captain Caminos go into the house?

A. After I found Burns, I asked Burns whether he needed help; he said "No".

Q. I see.

A. Then Captain Caminos came in. [446]

Q. Then Captain Caminos came into where?

A. Into the house.

Q. In the room that you and Burns were in?

A. In the reception room.

(Testimony of Kam Yuen.)

Q. In the reception room. What do you mean by the "reception room"?

A. Well, there is—I don't know whether you would call it a reception room; there is a large room.

Q. The large room is what you are talking about. That is where you had a conversation with Captain Caminos and that is downstairs. You had a conversation with him; that is where you got your instruction from Captain Caminos? A. Yes.

Q. He told you to go and look for some girls?

A. He told me to go upstairs and bring the woman down.

Q. Where was "Speed" all this time?

A. She was moving about. I didn't see her.

Q. She was downstairs?

A. She was upstairs.

Q. You were sent up by Captain Caminis to stand by "Speed" while she was upstairs and watch her; you deny that? A. No.

Q. You deny that you were sent up by Captain Caminis to watch "Speed" when "Speed" went upstairs to get dressed?

A. Not that I remember of.

Q. You don't remember but you went upstairs?

A. I did. [447]

Q. Right after "Speed" went upstairs, isn't that correct? A. Yes.

Q. You found yourself upstairs? A. Yes.

Q. And "Speed" was in that room?

A. Yes.

(Testimony of Kam Yuen.)

Q. You saw "Speed" there? A. Yes.

Q. Did you see any other woman in that room?

A. No.

Q. Did you hear any conversation by "Speed" or any statement while you were there?

A. Not that I remember of.

Q. Not that you remember. You were up there until "Speed" came downstairs and "Speed" was taken away, isn't that correct? A. Yes.

Q. You were in constant company of "Speed" until she was taken away, isn't that right? You were right there watching her every move?

A. No.

Q. What were you doing up there, sitting down?

A. Standing.

Q. Standing. Now, when the door opened, did you see anybody make any statement?

A. No.

Q. Did you hear Captain Caminos make any statement? A. No, I don't remember.

Q. You don't remember. Did you hear anything about [448] arrests?

A. I don't remember.

Q. You don't remember?

A. I don't remember.

Mr. Dwight: No further questions.

Redirect Examination

By Mr. Young:

Q. Kam Yuen, you say that Officer Caminos detailed you to go upstairs to get a woman?

(Testimony of Kam Yuen.)

A. Yes.

Q. That was "Speed". Who was it, do you know? A. I don't.

Q. Beg pardon? Do you know?

A. I don't know the woman.

Q. "Speed" was upstairs when you got there?

A. I don't remember. She might have gone up before I did.

Q. She was up there when you got there?

A. I don't quite remember.

Q. Did you see "Speed" change her clothes up there?

A. No, I didn't follow her all around.

Q. You didn't follow her all around up there?

A. No.

Q. Did she have different clothes when she came out than when you first saw her? A. Yes.

Q. You didn't see her put those clothes on?

A. No.

Q. You know what part of the house she went to to put [449] them on? A. Yes.

Q. Where? A. In the room.

Q. She went into another room? A. Yes.

Q. When she came out she had some different clothes on, is that correct? A. Yes.

Q. You weren't with her during the time that she was changing her clothes?

A. No, I wasn't.

Q. Now, how long have you been a police officer before this raid on August 3rd?

(Testimony of Kam Yuen.)

A. About two weeks.

Q. About two weeks. This was your first raid?

A. Yes, sir.

Q. You have testified to everything that you remember? A. Yes.

Mr. Young: No further questions.

The Court: That is all. You are excused.

Recross Examination

By Mr. Dwight:

Q. Just a moment. Kam Yuen, when you went upstairs you said Mrs. Warren went into a room?

A. Yes.

Q. And she, you say, closed the door?

A. I don't remember.

Mr. Young: He did not say she closed the door. [450]

By Mr. Dwight:

Q. You don't remember in what direction. How big is this room upstairs that you were standing in after you go upstairs?

A. Oh, about three-fourths the size of this, where the rail is (indicating rail in court-room). About from that wall (indicating) to somewhere around here, approximately (indicating).

Q. About 12 feet by about 20 feet; would that be a fair estimate? A. About.

Q. Twelve by twenty? A. About that.

Q. And you were standing in the middle of the room when you came upstairs?

(Testimony of Kam Yuen.)

A. I don't remember whether it is the middle or side.

Q. Which direction; does the room run this way (indicating on Ex. "A")? Here's Muliwai Street (indicating on Ex. "A"). A. Yes.

Q. Does that room run this way, something like that (indicating on Ex. "A")?

A. I don't remember.

Q. You don't remember in what direction the room runs? A. No.

Q. Mrs. Warren went into a room and that room is situated at the other end of this big room?

A. Yes.

Q. She never went over on this side of the house at all upstairs (indicating on Ex. "A")? [451]

A. I don't remember.

Q. You don't remember. And how long was she in that room? A. I don't remember.

Q. And so that about how far away were you from the door to the room?

A. The door of the room?

Q. Yes, the door of the room that Mrs. Warren went in?

A. I don't remember how many feet.

Q. Can you give us any idea, from you to me?

A. About that.

Q. You were standing about that distance from the room? A. Yes.

Q. From your observation upstairs, where you were standing, there are rooms on this side (indicating)? A. Yes.

(Testimony of Kam Yuen.)

Q. There is a kitchen on this side you could see? (Indicating) A. Yes.

Q. Did you see Mrs. Warren go near that?

A. Yes.

Q. When did she go near that?

A. She called one Army Sergeant; she went in the kitchen and whispered.

Q. You heard the talk to the Army Sergeant?

A. Yes.

Q. That was the only conversation that took place?

A. As far as I can remember.

Q. That Army Sergeant was the witness that testified [452] here the other day?

A. I don't know; I wasn't here the other day.

Q. He was the only man that was upstairs when you went up?

A. I think there was another fellow.

Q. There was radio? A. Yes.

Q. Where is that radio located?

A. I don't remember.

Q. There is a steps; in relation to the steps that you come up, where was the radio, on the other end of the room? A. I don't remember.

Q. You don't remember? A. No.

Mr. Dwight: No further questions.

Mr. Young: That is all.

The Court: Witness excused. The Court will rule on that motion to introduce Exhibit "H". The

Court sustains the objection and denies the introduction of Exhibit "H".

Mr. Young: May we have our recess now, at this time?

The Court: The Court stands in recess for ten minutes.

(A brief recess was taken.) [453]

DAVID LIU,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Doctor David Liu.

Q. What kind of a doctor are you, what profession? A. Medical doctor.

Q. Where did you receive your education, Doctor Liu? A. You mean medical?

Q. Yes.

A. Loma Linda, Southern California. Loma Linda College of Medical Evangelists is the name of it.

Q. When did you receive your degree?

A. 1929.

Q. Where have you been since 1929?

A. In Portland and Honolulu.

Q. Practicing medicine? A. Yes, sir.

(Testimony of David Liu.)

Q. Duly licensed physician and surgeon in the Territory of Hawaii? A. Yes, sir.

Q. What is your work?

A. At the present time I am Second Assistant and also Acting Coroner's Physician.

Q. Of what?

A. City and County Health Department.

Q. How long have you held that position?

A. For the last six, seven, eight years.

Mr. Young: Any questions on the doctor's [454] qualifications?

Mr. Dwight: I don't want to admit the doctor's qualifications. I would like to reserve the right to take that up on my general cross-examination. If at that time the doctor is qualified, I won't make my motion to strike.

By Mr. Young:

Q. Doctor, were you in the service of the City and County as a physician and surgeon on August 4, 1937? A. Yes, sir.

Mr. Dwight: At this time I object to counsel refreshing the doctor's memory. He has a right to testify from his independent recollection. I object to counsel showing him any papers.

Mr. Young: This is preliminary. I will withdraw the question.

The Court: Proceed, then.

By Mr. Young:

Q. Doctor, do you recall on the 4th day of August whether you performed any autopsies—I

(Testimony of David Liu.)

mean on the 4th day of August, 1937, whether you performed any autopsies? while in the employ of the City and County of Honolulu?

A. Yes, sir.

Q. How many autopsies did you perform?

A. I don't remember but I did one at least.

Q. You did one at least. Who was that person, do you know?

A. It was given me as Wah Choon Lee.

Q. And what is an autopsy, doctor?

A. It is an examination of a body after death. [455]

Q. For what purpose?

A. To determine the cause of death.

Q. Examination of a body to determine the cause of death; is that the medical definition of an autopsy? A. Practically, yes.

Q. Now, where was the body of Wah Choon Lee when you performed this autopsy?

A. In the City and County morgue.

Q. Would you know a picture of that body if you saw it again? A. Oh, yes.

Q. Now, what did you do with the body? What were your findings, doctor?

Mr. Dwight: Just a moment. May I ask the Court to caution this witness if he is going to give that conclusion at this time, that he confine his answers entirely to his autopsy and not to what anybody gave him, not from any information that he received from any outside source.

(Testimony of David Liu.)

By the Court:

Q. You understand Mr. Dwight's suggestion?

A. Yes, sir.

Q. That you confine your testimony strictly to the autopsy and not what anyone told you, any outside information? A. Yes, sir.

By Mr. Young:

Q. What were your objective findings at the autopsy? What did you find?

A. Well, I did not see his clothing but at the time [456] he had no clothing. Both hands were covered with mud, red mud. There was a evulsion of the skin on his right thumb, externally. That is all there was.

Q. That is the only mark externally on the body?

A. Yes, sir.

Q. And did this evulsion appear to you to be a fresh one or old one? A. Fresh.

Q. Fresh one? A. Fresh origin.

Q. What do you mean by an evulsion?

A. Loss of the skin, loss of the normal tissue.

Q. Now, did you open up the body?

A. I opened the head and the body.

Q. What were your findings?

A. In opening the head I found that the brain was very congested and I opened the chest and abdomen and found that the heart was contracted and revealed numerous pertechial hemorrhages, small hemorrhages on the heart. The organs of

(Testimony of David Liu.)
the abdomen was markedly congested. That is all I found.

Q. Now, what was the condition of the body from the standpoint of your observation? Was it a well-developed or not well-developed body?

A. Well-developed.

Q. Well-Developed male?

A. Male; yes, sir.

Q. Did you examine any other parts of the body?

A. I examined but I didn't find anything.

Q. The only things that you found that attracted your [457] attention was the congestion in the brain, the small hemorrhages in the heart and the fact that the heart was contracted?

A. Yes, sir.

Mr. Dwight: May I again ask the Court to caution the witness that he confine his answers solely to what he found there?

The Court: I did. What is the question again?

By Mr. Young:

Q. Just from seeing that body, what you saw of the brain and heart, would that condition there indicate anything to your mind as to what happened to the body, if you did not know any of the history?

A. I wouldn't know.

Q. You wouldn't know? A. No, sir.

Q. Would you, just from your examination there, from what you saw if you had no history at

(Testimony of David Liu.)
all of what happened to the body, would you have an opinion as to what the cause of death was?

A. It is rather difficult.

Q. Now, doctor, assume, doctor, that this body, that you examined this body when it was living and when it was the person of Wah Choon Lee on the day before August 3, 1937, at about 9 o'clock p. m., and it was standing either upon a metal plate or upon a cement walk, which was wet, and assuming further that this person, Wah Choon Lee, while so standing in such a position reached up with his arms and grabbed with his bare hands a copper plate which was attached, made contact with a screen, which was attach- [458] ed to a wire carrying a voltage of 600 volts, assume that, doctor; assume that after the man had touched this copper plate he shook for a matter of a couple of seconds and fell back into the arms of a person that caught him; assume that he was taken from that point to a hospital and that he was pronounced dead at 20 minutes later, or at 9:20 p. m.; assume that on the way to the hospital a person that was with him felt his body grow cold,—first warm and then grow cold on the way to the hospital; now, doctor, together with your findings on that body and these facts, would you have an opinion as to what the cause of death was?

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial, as being a misstatement of the evidence, not assuming all of the facts upon which a doctor can base his opinion, therefore the hypo-

(Testimony of David Liu.)

thetical question is improper, incompetent and immaterial.

The Court: Objection overruled.

Mr. Dwight: Note an exception.

The Court: Exception may be noted.

By Mr. Young:

Q. Would you have an opinion as to what the cause of death was? A. Yes, sir.

Q. What is your opinion based on, your medical experience and knowledge of an electric shock?

A. He died of electric shock.

Q. Would that opinion be consistent with your findings in the body as to the condition of the heart and brains? [459]

A. It is possible, yes, sir.

Q. Assuming those same facts, doctor, that I gave to you in the previous question and taking into consideration the finding on the thumb of the evulsion that you have testified to, would you have an opinion as to whether or not that mark on the thumb, that evulsion, was caused by the contact with that copper plate charged with 600 volts of electricity?

Mr. Dwight: May I have my same objection and exception to the prior ruling?

The Court: You may have it to this and the prior question. Overruled.

By Mr. Young:

Q. Do you have such an opinion?

(Testimony of David Liu.)

A. It is very hard to tell what that is.

Q. You couldn't state whether that could have been caused by that or not? A. No.

Q. It could have? A. It is possible.

Q. It is possible? A. Yes.

Q. What time did you perform your autopsy?

A. About nine o'clock.

Q. About nine o'clock in the morning?

A. In the morning.

Q. August 4, 1937? A. Yes.

Q. Now, I will show you Prosecution's Exhibits "B" and "C" in evidence. Examine those two pictures and [460] tell the jury whether or not this is the body that you testified about.

(Mr. Young handed the pictures, Prosecution's Exhibit "B" and Prosecution's Exhibit "C", to the witness.)

A. (After examining the same) Yes, sir.

Q. That is the body? A. Yes, sir.

Q. Referring to Prosecution's Exhibit "C" in evidence, will you look at the hand portrayed there? A. Yes, sir.

Q. Will you tell the jury whether or not that represents the thumb that you testified to when you performed the autopsy? A. Yes, sir.

Mr. Young: No further questions.

(Testimony of David Liu.)

Cross Examination

By Mr. Dwight:

Q. These other dark things shown on the other fingers is mud that you testified to?

A. I think so.

Q. The only other mark that you saw on the body was this evulsion? A. Yes.

Q. That is what it appeared to be. If you rub it against a rough surface, a piece of skin falls off; that is all you had there? A. Yes, sir.

Q. Now, doctor, in practically every case where death is caused by electricity, isn't it a fact that there is [461] present on the body somewhere burns, so-called burns, as they call it?

A. Not in every body.

Q. Not in every body? A. No, sir.

Q. Are you sure about that? A. Yes, sir.

Q. You ever read "Herzog on Medical Jurisprudence"? A. I know Webster.

Q. You are not familiar with "Herzog on Medical Jurisprudence"? A. No.

Q. You ever hear of Doctor Herzog?

A. I am not certain.

Q. I think his book is published May 1, 1931. Have you consulted any authorities on the subject by authors subsequent to that date?

A. Yes, sir.

Q. Webster, subsequent to that date?

A. Yes, sir.

Q. When was Webster published?

(Testimony of David Liu.)

A. I think it is around 1935.

Q. 1935. Now, you didn't find any burns on the body? A. Burns?

Q. Yes, burns commonly connected with electrocution? A. No, I didn't.

Q. Now, doctor, you say you have practiced here and up in Portland, Oregon. You had just a general experience of medicine? A. Yes, sir. [462]

Q. Surgery and physician? A. Yes, sir.

Q. Do you know anything about the disease called shanker? A. Yes, sir.

Q. What is that?

A. That is a disease of syphilis.

Q. Is it a syphilitic condition?

A. Yes, sir.

Q. It is virulent?

Mr. Young: If your Honor please, I object to this evidence about syphilis as being incompetent, irrelevant and immaterial, not proper cross examination of this doctor. This doctor has only testified to the electrocution and about the body in question. If counsel wants to prove there are any shankers, he will have to prove it in another way.

Mr. Dwight: I have a perfect right to examine this doctor on his qualifications. There are some subjects, and I am testing his ability as a doctor and that is for that purpose.

The Court: Objection overruled.

By Mr. Dwight:

Q. Can you answer the question?

(Testimony of David Liu.)

A. What was that question again, please?

Q. When a person has a shanker, syphilis, it is most contagious at that time?

A. It is most contagious at that time.

Q. It is most contagious at that time. Now, doctor, [463] assuming a person has shanker and has—say, she is nervous, calls the police, invites people to her house, jumps out of a taxicab because she doesn't like what the driver said——

Mr. Young: I object to this——

Mr. Dwight: Just a moment, let me finish my statement. (Continuing) Jumps out of a taxi in front of the Y. M. C. A. because she didn't like the remark the taxi driver had said, called the police and said that somebody was shooting her when she had a pin sticking in the back of her shoulder; taking those facts into consideration would you say that person was insane from syphilis?

Mr. Young: Objected to as incompetent, irrelevant and immaterial, not proper cross examination. It is apparent on the face of it counsel is trying to prove his case by this witness.

Mr. Dwight: I have the answer in the text.

Mr. Young: I still object to it as being incompetent, irrelevant and immaterial, not proper cross examination. Let counsel recall this doctor if he wants to make him his own witness.

Mr. Dwight: I have a right to test his qualifications. I have a right to ask of his experience. I have a right to ask about cases that have come to his knowledge. I am defending this defendant here.

(Testimony of David Liu.)

The Court: The Court will sustain the objection as not proper cross examination.

Mr. Dwight: Save an exception. [464]

The Court: Exception noted.

By Mr. Dwight:

Q. Doctor, does syphilis affect the brain?

A. At a certain stage, yes, sir.

Q. And when you say "Yes, sir", you mean that syphilis is a disease that causes insanity, isn't that correct?

A. Not all syphilis results in insanity.

Q. Not all syphilis results in insanity?

A. If properly treated.

Q. Oh, yes, if properly treated. Assuming that syphilis is not properly treated and you got syphilis and shanker, would that affect the brain?

A. Not all cases.

Q. The majority of cases?

A. I don't know what percentage.

Q. You do know, doctor, that it does affect the brain? A. Yes, sir.

Q. Paresis follows? A. Yes.

Q. How soon does it follow?

A. Invariably.

Q. It may start with the inception, it may start sometime afterwards?

A. Usually quite some time afterwards.

Q. And paresis—a person with paresis is insane?

A. Yes, sir.

(Testimony of David Liu.)

Q. And paresis is what you would call the softening of the brain? A. Yes, sir.

Q. And paresis is caused always from syphilis? [465]

A. Oh, yes.

Q. Now, doctor, is there any definite way of determining whether a person died from electrocution as distinguished from a person dying from shock? A. No.

Q. No way of determining? A. No.

Q. If I kicked you in the stomach hard enough, doctor, and artificial respiration was not given to you or proper treatment given to you and you died —you better have me die and you cut me open and looked at my heart, would you find the same condition that you found in that body?

A. I don't think you would find the hemorrhages.

Q. Are you sure about that?

A. Yes, sir.

Q. If I received a severe shock from fright that scared the life out of me and I collapsed and died, would you find that condition in the heart?

A. I never seen it.

Q. You never had an opportunity. I am speaking now, theoretically.

A. You will find the same condition. It is pretty hard to believe it.

Q. How about the congestion in the brain?

A. There is no congestion in the brain from death in that way.

(Testimony of David Liu.)

Q. Now, doctor, have you ever heard of this statement in—By the way, doctor, did you take a microscopic examination of the tissues of the heart at all? A. No, sir. [466]

A. No, sir.

Q. You ever hear of that being the positive way of determining whether a person died from electricity, the effect on the tissues? A. Yes.

Q. That test wasn't made? A. No.

Q. And usually, doctor, where a person grabs an electric wire, he can't let go until he is dead, isn't that correct?

A. It would all depend on the voltage.

Q. Well, 600 volts, I think that was put in here?

A. I am not familiar about that.

Q. You are not familiar? A. No, sir.

Q. Isn't it the fact, where there is a high voltage, doctor, that the man must die before the hold is released?

A. I don't know anything about it. The majority of cases had already happened and are brought to me.

Q. Have you ever read on page 272 of Doctor Herzog's book on "Medical Jurisprudence"?

Mr. Young: I object to counsel reading the statements to the witness about a book he has never read.

The Court: Objection sustained.

Mr. Dwight: Very well, I will withdraw my present question, if I have one pending.

The Court: All right, withdrawn.

(Testimony of David Liu.)

By Mr. Dwight:

Q. Doctor, have you ever seen anybody that had been [467] electrocuted in an electric chair?

A. No, sir.

Q. A body? A. No, sir.

Q. Were you a doctor at the City and County when this fellow grabbed a wire down here (indi-dicating towards the sea)? A. Yes, sir.

Q. He was burned, was he?

A. I think so.

Q. He was toasted? A. Yes.

Q. And he was burned where his body came in contact with the wire? A. I think so.

The Court: Did you see the body?

A. I saw the person. I don't know what person you are referring to.

By Mr. Dwight:

Q. I am referring to the man the police were after.

A. I seen that man. I did one last week. Another person touched the wire.

Q. Burned?

A. His voltage was terrifically high, 11,000 volts.

Q. I mean, was he burned?

A. Yes, sir.

Q. In every case where you have experience down here, people coming in contact with electric current, you have found non-medical evidence of burns, excepting this present case? [468]

(Testimony of David Liu.)

A. You mean from any burns?

Q. From burns.

A. I saw one at Kaneohe Bay. He didn't have a single burn.

Q. That was the fellow standing in the ocean?

A. I presume 110 volts.

Mr. Dwight: I think that is all.

Redirect Examination

By Mr. Young:

Q. Doctor, do I understand your testimony to be some cases of electrocution some burns are present and some are not? A. Yes.

Q. All depending upon the voltage?

A. Yes, sir.

Q. Do the type of burns, when they are present, do they vary? A. Yes, sir.

Q. Some may look different than others?

A. Yes, sir.

Q. I believe on your direct examination you testified that this mark on the thumb might have been a burn?

A. I don't know; it might have been.

Q. It might have been a burn; it might have been a scrape? A. Yes.

Q. You don't know? A. No.

Mr. Young: No further questions.

Mr. Dwight: No further questions.

The Court: Witness excused. [469]

Mr. Dwight: While we are having a little intermission, I will ask to recall Captain Caminos for further cross-examination, if counsel will not admit that.

Mr. Young: I object to counsel asking me to stipulate anything in the presence of the jury.

The Court: Take that up in recess. Swear the witness.

LEVI KALAULI,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Captain Levi Kalauli.

Q. Captain of what?

A. Captain of the Rural District, Captain of Police.

Q. Captain of Police, City and County of Honolulu? A. Yes, sir.

Q. How long have you been a police officer?

A. Twenty years.

Q. And where? How long have you been stationed at your present post?

A. About six years.

Q. Six years; that is, at Wahiawa?

A. Yes, sir.

Q. Do you know a person by the name of Ilene Warren alias "Speed" Warren?

(Testimony of Levi Kalauli.)

A. I do. [470]

Q. Is she in the court-room here this morning?

A. Yes, sir.

Q. Where is she, please?

A. She is right there.

(The witness indicates the defendant.)

Mr. Young: May the record show the identification?

The Court: Let the record so show.

By Mr. Young:

Q. How well do you know "Speed" Warren?

A. Very well.

Q. Very well. Do you speak to her when you see her?

A. She generally comes to my office and talks to me.

Q. How long has that acquaintanceship lasted, approximately, just roughly?

A. I think ever since 1933.

Q. 1933. About five years? A. Yes, sir.

Q. Do you know where she lives?

A. Yes, sir.

Q. Do you know where she lived on August 3rd of 1937? A. Yes, sir.

Q. Where did she live on that date?

A. She lived at her home on Muliwai Street.

Q. What town? A. Wahiawa.

Q. Will you look at the exhibits on the board, those pictures, "D", "E", "F" and "G", and tell

(Testimony of Levi Kalauli.)

the jury whether or not that was her home on August 3, 1937?

A. (The witness examined the same.) Yes, sir, this [471] is her home.

Q. That is her home? (Indicating)

The Court: What exhibit is *the* pointing to?

Mr. Young: He is pointing to "F".

Q. How about this picture here (indicating)? Will you look at that one? A. Yes, sir.

Q. What is that? A. Part of her home.

Q. What part of her home?

A. The side, it was taken.

Q. There is an opening in the bottom. Do you know what that opening is?

A. This opening here (indicating)?

Q. By that rail there is a door there. Do you know what that is? A. No, I don't.

Q. Do you know whether or not that is the front or the back door? A. No, I can't say.

Q. You couldn't say. Will you take the stand please? Now, did anything happen on August 3, 1937, that was unusual, that you recall?

A. Yes, sir.

Q. What happened unusual on that day?

A. On that day Police Officer Wah Choon Lee met with his death.

Q. Do you know what happened to him?

A. I saw what happened.

Q. Will you please tell the jury what you saw? [472]

(Testimony of Levi Kalauli.)

A. On that night a raid was conducted at the home of Mrs. Ilene Warren at Wahiawa, Oahu. Accompanying me to the scene was Captain Caminos, Officer Burns, Officer Apoliona, Officer William Chun, Officer Kam Yuen and Officer, deceased Officer Wah Choon Lee. Upon arrival at the scene we were out on the road.

Q. Who do you mean by "we"?

A. I will get to that.

Q. Thank you. Just go ahead.

A. Officer Caminos—Captain Caminos, Officer Kam Yuen and Officer Wah Choon Lee and myself were out on the road near the front entrance of Mrs. Warren's home. Officer Burns, who knocked at the door of the house and the door was opened and walked in, was the only officer that was near the house and the only officer that made entrance of the home at that time. A few minutes later on the police whistle blew from the inside. We ran to the entrance and over to the door of the house. There was a little noise in the house, inside of the door upon our arrival. Officer Caminos in a loud voice called, " 'Speed' Warren, open the door; we are police officers." This was repeated for three times. Officer Captain Caminos kicked the door, followed by Officer Lee. Immediately after that Officer Lee reached up for the door of the house, that is, the metal piece of iron, and I was about the middle of the two of them; Captain Caminos

(Testimony of Levi Kalauli.)

on my right and Officer Lee on my left; reaching for the top of the door, meaning Officer Lee. I immediately thought it would be the best way to get the door out. By a split second, the officer started to yell and I sidestepped direct- [473] ly in the rear of the officer. The officer was leaning backward with his hand up against the metal piece of the door. Finally his hands were released. He fell right into my arms. I dragged him from the door a little ways off and lay him down on the ground. I worked on him, turned him sideways and turned him upside down, thinking I would bring the officer to, but when I called his name there was no answer from him. I realized at that time that the case was serious. I was there alone and the rest of the officers there were under the direction of Captain Caminos. It happens that Captain Caminos come out from the building and I asked him to look for the officer on the ground and I to go back to the Station for my car to have the officer taken direct to the hospital. I did; I ran back to the Station and found one of my officers there. I instructed him to go down to "Speed" Warren's place, get the officer and rush him to the hospital. I did not make any entrance of the home that night when this incident happened, nor did I examine anything in the house. I immediately then made the report to the Police Station in Honolulu of this incident. Immediately after that I received a call from the Post Hospital,

(Testimony of Levi Kalauli.)
Schofield Barracks, that the officer is gone. I relayed the same message to Honolulu again of the incident. The investigation, as a whole, was conducted by Captain Caminos and the officers on the scene until the arrival of Captain Hays, Chief Gabrielson and other officers.

Q. Captain, did you at any time touch this door?

A. I did not. [474]

Q. What was the condition of the weather when you arrived there?

A. It was wet, drizzling at the time.

Q. Was it drizzling when you were at the door?

A. Yes, sir.

Q. Was there a light on the door?

A. There was a light right in the middle of the door as you go into the building.

Q. You mean above the door?

A. Above the door, right in the middle.

Q. Did you get a good look at that door while you were there that evening?

A. I did for a very short time.

Q. Can you describe how that door looked to you at that time?

A. I haven't measured; I haven't made any measurement of the door, nor the width of the door, but, however, it was a piece of—it was a metal piece of iron that extends from the bottom up to about three-quarters ways up.

Q. And what part of that did Wah Choon Lee grab? A. The top part.

(Testimony of Levi Kalauli.)

Q. The top part. How did he grab it? Will you illustrate just the way he grabbed that iron? Stand up, please. Just pretend that that door is in front of you. A. In this manner.

(The witness stands up and takes hold of the rail of the witness stand with both hands in demonstrating.)

Q. Then he gave a yell and fell into your arms? [475]

A. He gave the yell and I sidestepped directly in the back of him.

Mr. Young: No further questions.

Cross Examination

By Mr. Dwight:

Q. Captain, you say that this investigation, as you term it, was conducted by Captain Caminos?

A. Yes.

Q. Was there any discussion before you folks went down there, at the Wahiawa Police Station?

A. There was.

Q. Did Caminos make any statement to the brother officers there?

A. The statements that Captain Caminos made to the officers, especially the new ones,—Kam Yuen, Francis Apoliona and William Chun were new officers. They were instructed not to touch anything or not to go until they got the direct orders.

Q. What were you folks all going down there for, Captain?

(Testimony of Levi Kalauli.)

A. We were going down there to raid "Speed" Warren's place.

Q. Did you have a search warrant?

A. No.

Q. Did you have a warrant of arrest?

A. No, I have not.

Q. Did you bring that subject up at the conference? A. No, I did not.

Q. Nothing was said about the search warrant?

A. No, I did not. [476]

Q. Was that discussed at the meeting at the Police Station? A. No.

Q. Was anything said about going down there, rushing in and raiding the place? Was that the idea? A. No.

Q. What was the idea as you got it?

A. It was arranged this way: When a police whistle blew from inside the house, then we rush to the door.

Q. To break into the house?

A. No, not to break in the house.

Q. And demand admittance?

A. I don't think there was any discussion of demanding admission.

Q. When you hear the whistle, run for the door?

A. Run for the door.

Q. Who was to blow the whistle?

A. The officer that made entrance of the building; that is Burns.

(Testimony of Levi Kalauli.)

Q. Did you see the three marks dollars that he had? A. I did not.

Q. Did you see the three marked dollars passed between Burns and Caminos? A. I did not.

Q. Was anything said about marked money?

A. I did not hear it.

Q. Was anything said about Burns not taking off his clothes? A. I did not.

Q. Was anything said to Burns about not having [477] intercourse with any of the women?

A. I did not.

Q. All you heard was Burns was to go in; when he got inside he was to blow the whistle and you were to come to the door?

A. Yes, that is all.

Q. That is all the instructions?

A. Maybe there were instructions given to the man that I did not hear.

Q. All I am talking about is the instructions given at the Wahiawa Police Station.

A. No.

Q. Where were you, hiding in the bushes?

A. No, I was on the road.

Q. The rest of them were all in the bushes?

A. No, not in the bushes. We were on the road; some on the side, some in the rear, some in the front. I know Captain Caminos was in front of me.

Q. This Yuen was right there, too?

A. No, Yuen was in the rear and myself.

(Testimony of Levi Kalauli.)

Q. You seen those "No trespassing" signs that Mrs. Warren has outside of her place?

A. Not that night.

Q. You have seen it before that?

A. I can't recall.

Q. Right there where you folks were hiding; you were hiding by the sisal bush, right there where the driveway is?

A. We were not hiding behind the sisal tree; we were on the road at the time. [478]

Q. Anyway, you were right by the sisal bush?

A. We were near to the sisal bush, which is very near to the road.

Q. There is a hedge there and on this side there is an entrance and a hedge?

A. Entrance and hedge.

Q. A little bit along the hedge, did you see a great big sign about three feet in, "No trespassing"?

A. As I said, there might be a sign there. I can't recall.

Q. You didn't see it? A. No.

Q. Where was Caminos, was *the* crouching down or was he standing up?

A. We were all standing up.

Q. I am speaking of the time when you were by this sisal bush, when you were outside in the road.

A. Well, I can't remember; he was in the front of me, standing in the front of me.

(Testimony of Levi Kalauli.)

Q. By the way, did you see Burns go inside the house? A. I did.

Q. How long after he got in did he blow the whistle, quick?

A. Sometime; I could not tell you exactly.

Q. Pretty quick?

A. I would not say very quick; opened the door, went in, sometime after that. I couldn't tell you the exact minutes that he was in there at the time.

Mr. Dwight: Your witness.

Mr. Young: No further questions.

The Court: Thank you, Captain. [479]

The Court: It is time for 11 o'clock recess. The Court will stand in recess for five or ten minutes.

(A brief recess was taken.)

JAMES S. BUNNELL,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name?

A. James S. Bunnell.

Q. Where do you live, Mr. Bunnell?

A. 1564 Magazine Street, Honolulu.

Q. Honolulu? A. Yes, sir.

Q. What is your profession?

(Testimony of James S. Bunnell.)

A. Electric Meter Engineer.

Q. And how long have you been practicing that profession? A. For about 13 years.

Q. What is your present connection?

A. I am the Meter Superintendent of the Hawaiian Electric Company.

Q. As Meter Superintendent of the Hawaiian Electric Company, what work is in your hands?

A. The installation of all meters, the completion of all service orders and also investigation of special permits, permits that come up once in a while.

Q. Where did you receive your education in engineering? [480]

A. Polytechnic College of Engineering, Oakland.

Q. What degrees did you receive?

A. Bachelor of Science.

Q. When did you receive that?

A. 1923; in 1923; graduated in 1923.

Q. Have you studied further after receiving your degree? A. I study constantly.

Q. How long have you been in the Territory of Hawaii?

A. I came to the Territory November 1, 1935.

Q. And how long have you been holding your present position with the Hawaiian Electric Company?

A. Since that time I came to the position.

(Testimony of James S. Bunnell.)

Mr. Young: Any questions on the qualifications as to being an electrical engineer.

Mr. Dwight: Well, your Honor, may I reserve my right to move and to examine him upon his qualifications upon my cross examination.

The Court: You may. Proceed with the examination.

By Mr. Young:

Q. Mr. Bunnell, as Superintendent of the Meter Division, is what you said?

A. Of the Hawaiian Electric Company, Meter Department.

Q. Are you acquainted with the substation at Wahiawa?

Mr. Dwight: Just a moment. Is this witness being called as an expert or is he being called as an opinion expert?

By Mr. Young:

Q. Just this one question: Are you acquainted with [481] that substation?

A. Yes, sir; I know the location of the substation. I go in there quite frequently.

Q. You know the current that goes out over it?

A. Yes.

Q. Now, Mr. Bunnell, assume that an electric three-way wire, carrying a current with a voltage of 115 volts, has its source from the circuit arm of 4,000 volts on an Hawaiian Electric line fed from Wahiawa Substation; assume further that this elec-

(Testimony of James S. Bunnell.)
tric wire with a potential of 115 volts enters a house out there near the Wahiawa substation and that this line, after passing through the switch near the fuse plugs, is attached to and passes through a knife-type switch; that the two wires from the knife-type switch lead to a transformer in the house, which steps up the voltage to 600 volts; assume further that one of the wires leading from the transformer is attached to a screen on a screen door, which screen makes contact with a copper plate on the outside of that door; that another wire leads from the transformer in the house to a pipe ground; assume further that there is an iron or metal door mat resting on a cement walk just in front of the door; and assume that it is raining or drizzling; that the cement is wet; that the iron door mat on the cement is wet; assume further that a human being stands upon the iron door mat, which is resting upon the wet cement, and that this human being, a male, grasps the copper strip on the door firmly with his bare hands; would you have an opinion, based upon your knowledge and experience as an electrical engineer, as to whether or not it would be dangerous to the life [482] of the person so situated for another to close the switch that I have mentioned?

Mr. Dwight: Objected to as incompetent, irrelevant, may it please the Court, upon the first ground that the facts as stated are not shown by any evidence testified in this case and are based upon facts

(Testimony of James S. Bunnell.)
not of record in this particular case; second, that it calls for the conclusion of this witness, not as an electrical expert, but as a medical expert in determining the question of a dangerous instrumentality to man and man's health.

The Court: Have you anything to say?

Mr. Young: Certainly an electrical engineer is competent to testify so far as something is dangerous. Anyone working with electricity can testify as to whether a certain amount is dangerous.

The Court: Will you please lay by questions a foundation as to his experience as to the fact of danger?

By Mr. Young:

Q. Just setting aside this assumed case, Mr. Bunnell, for the time being, have you, in your work as an electrical engineer, ever seen anyone injured by coming in contact with live wires, electric wires?

A. I have never seen them fatally injured. I have seen them come in contact with wires up to six or seven hundred volts.

Q. Have you seen the effect on those people?

[483]

A. I have felt the effect myself.

Q. From your knowledge and experience, do you know what the effect of a certain voltage would be on a person, whether it would be dangerous or not?

Mr. Dwight: Objected to on the same ground. The mere fact he has taken 700 volts and knows how it feels doesn't qualify him as an expert on

(Testimony of James S. Bunnell.)
what effect it would have upon a human being. He isn't qualified as a medical expert.

Mr. Young: He is an electrical engineer, a man handling electricity every day, consequently can know when a certain thing is dangerous, otherwise how can he perform his work.

The Court: Will you read the latter part of that question, where the opinion comes in, just the last line of that question?

(The last question was read.)

Mr. Dwight: May it please the Court, this isn't a qualifying answer. The question was, "Have you seen the effect on any person in receiving an electric shock?", and he says, "No, I have taken 700 volts myself". Now, that doesn't constitute him as an expert.

Mr. Young: If your Honor please, I am sorry. This witness is not testifying as to what effect electricity has after it enters the body. I will have Doctor Faus testify to that. He can certainly testify as to whether the touching of the wires is dangerous, from an electrical engineer's standpoint, from his knowledge and practice, based upon his experience. As to the effect, that [484] is the doctor's testimony. He, as an electrical engineer, can state whether it is dangerous to life.

The Court: He can testify what the degrees of electric current will be. The Court will sustain the objection.

Mr. Young: Before your Honor rules on that, I have several cases in point.

(Testimony of James S. Bunnell.)

The Court: Do you wish to ask any other questions?

Mr. Young: That is the only question.

Mr. Dwight: He can ask this witness how much voltage would go through a plate, if it is rigged up in that way.

Mr. Young: I have the authorities.

Mr. Dwight: I am ready to take it up.

Mr. Young: May we take it up?

The Court: All right. The Court will adjourn in chambers, and look at these authorities.

(A brief recess was taken.)

By Mr. Young:

Q. Just keeping separate in your mind the assumed case that I gave you and while back in your study of engineering and in your academic course and your subsequent study, have you studied anything when currents were dangerous and when they were not to human beings?

A. Are you talking about current voltage?

Q. I mean voltage and so on.

A. Yes, that is general practice. In your study anything over 110 volts is considered dangerous. The National [485] Underwriters' Code considers it dangerous.

Mr. Dwight: I move to strike that answer as not having shown the probable dangers and ask the jury be instructed to disregard it.

The Court: At this time it will be stricken.

(Testimony of James S. Bunnell.)

By Mr. Young:

Q. What I want to know, in college when you studied your electrical engineering, did you learn when voltages were dangerous to human beings in the course of those studies? A. Yes, sir.

Q. Has that knowledge since come to you, since you came out from college?

A. I studied in it in college and I since found out since I came out here.

Mr. Dwight: May I cross examine on this?

The Court: You may.

Cross Examination

By Mr. Dwight:

Q. Have you ever studied the effect of electricity on the human body, of electricity passing through it? A. We tested it.

Q. I ask you if you studied the cause and effect from a medical standpoint—— A. No.

Q. (Continuing) ——of electricity passing through the body of the individual to determine the injury resulting and the extent of that injury on the body?

A. I didn't study a medical course at all.

Q. Your knowledge of electricity, your experience [486] and your study has been confined, has it not, Mr. Bunnell, to the amount of voltage that passes through wires, isn't that it?

A. It doesn't pass through, between the wires.

(Testimony of James S. Bunnell.)

Q. Isn't that it?

A. Distribution of power, power utilities.

Q. In other words, you studied finally what would happen if you took an electric wire and connected it with a transformer and then at the contact point between the transformers, I think it is—in other words, you studied the proposition of how much the voltage would be upped if a transformer were put in?

A. I studied transformers, yes.

Q. You studied that, you studied transformers?

A. Yes.

Q. And you studied voltage?

A. Certainly

Q. But you never studied medicine, particularly that phase of medicine which deals with the cause and effect of the organs of the body due to a current of electricity passing through it? A. No, sir.

Direct Examination
(continued)

By Mr. Young:

Q. Mr. Bunnell, you say in college you did test the resistance of a human body to current?

A. Yes, sir.

Q. In there you did state what voltages were dangerous to human life?

A. We didn't take it up with dangers to humam life. [487]

Q. Well, dangerous to human life, have you?

(Testimony of James S. Bunnell.)

A. We always handle it as if it was dangerous and it is dangerous.

Mr. Young: May I be permitted to ask the witness, to ask the hypothetical question?

Mr. Dwight: I renew my objection upon the further ground that this witness has definitely stated that he has no knowledge of the cause and effect upon a human being or the organs of a human body of a charge of electricity passing through it.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

The Court: Exception noted.

By Mr. Young:

Q. I call your attention to the hypothetical statement with the additional fact this human being who stepped upon the iron or metal door mat had leather-soled shoes at the time he was standing upon the door mat.

Mr. Dwight: May I ask the hypothetical question be repeated and I want to listen to it?

Mr. Young: I will repeat it.

Q. Assume that an electric three-way wire, carrying a current and with a voltage of 115 volts has its source from a circuit arm of 4,000 volts on an Hawaiian Electric line fed from the Wahiawa Substation and assume further that this electric wire with a potential of 115 volts enters a house and that this line after passing through the fuse plugs

(Testimony of James S. Bunnell.)
is attached to and passes through a knife-type switch; that the two wires from the knife-type switch lead to a transformer which steps up the voltage [488] to 600 volts; that one of the wires leading from the transformer is attached to a screen on a screen door which makes contact with a copper plate on the outside of the door; that another wire leads from the transformer to a pipe ground; assume further that there is an iron or metal door mat resting on a cement walk just in front of the door and assume that it is raining; that the cement is wet; that the iron or metal door mat on the cement is wet; and assume further that a human being with leather-soled shoes dampened by water stands upon the iron or metal door mat, which is resting upon the cement; that this human being, a male, 24 years of age, grasps the copper strip on the door fairly with his bare hands; would you have an opinion, based upon your knowledge and experience as an electrical engineer, as to whether or not it would be dangerous to the life of the person so situated for another to close the switch while the person was in such a position? A. It would.

Mr. Dwight: May I renew my objection upon the ground that it is incompetent, irrelevant and immaterial; upon the further ground that the hypothetical question does not state the facts contained in the record in this case but assumes facts outside of the record in this case and upon the further ground that the witness has definitely testified that

(Testimony of James S. Bunnell.)

he is not and cannot under any rule be called a medical expert?

The Court: Objection overruled.

Mr. Dwight: Save an exception. [489]

The Court: Exception noted.

By Mr. Young:

Q. You have? I said an opinion?

A. Yes.

Q. What is your opinion?

A. My opinion is it would be dangerous to anyone taking hold of that door.

Q. Now, assuming the same set of facts, this switch is already closed, would it be dangerous to touch that with his bare hands?

Mr. Dwight: May I have my same objection?

A. It is my opinion it would be dangerous.

By Mr. Young:

Q. Would your opinion be any different if the person was standing on dry and not wet cement?

Mr. Dwight: It is assuming facts not in this case.

Mr. Young: We have a right to ask.

The Court: Objection overruled.

Mr. Dwight: Save an exception.

By Mr. Young:

Q. Would your opinion be any different if this person that we have assumed——

Mr. Dwight: I don't think there was any answer.

(Testimony of James S. Bunnell.)

The Court: The first question was withdrawn. You are asking another.

By Mr. Young:

Q. Assuming the same set of facts I asked you in the first hypothetical question, with the exception that [490] the person is standing upon a dry pavement, instead of wet pavement, at the time he grasped hold of the copper sheet?

A. It wouldn't be as dangerous.

Mr. Dwight: May I have my same objection and exception?

The Court: You may have.

A. It wouldn't be as dangerous as in the first but it would be dangerous because it is connected with the ground

By Mr. Young:

Q. Would you care to catch hold, being an expert?

A. I wouldn't do it intentionally.

Mr. Young: No further questions.

Cross Examination
(Continued)

By Mr. Dwight:

Q. Electricity is dangerous at all voltages, isn't it? A. Yes, sir.

Mr. Dwight: That is all.

Mr. Young: That is all.

(Testimony of James S. Bunnell.)

Mr. Dwight: May I move to strike the testimony of this witness upon the same grounds that I objected to it?

The Court: You may. Motion denied.

Mr. Dwight: May I have an exception to the Court's denial of my motion?

The Court: You may have your exception.

Mr. Young: If the Court will bear with me for a few minutes, we may be able to finish our case.

The Court: I will. [491]

ROBERT B. FAUS,

called as a witness for the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Doctor Robert B. Faus, City and County Physician.

Q. You are a medical doctor, are you not?

A. I am.

Q. You are duly licensed to practice surgery in the Territory of Hawaii? A. I am.

Q. How long have you been a physician and doctor here? A. Since 1921.

Q. Where did you receive your academic training, doctor?

(Testimony of Robert B. Faus.)

A. I attended the University of Colorado for my undergraduate work and I took my medical work at the University of Chicago, Rush Medical School.

Q. And you graduated when? A. In 1921.

Mr. Young: Any questions on the doctor's qualifications?

Mr. Dwight: May I reserve my right to examine the doctor as to the doctor's qualifications when I examine him generally upon cross-examination?

The Court: You may.

By Mr. Young:

Q. Doctor, did you ever know a person by the name of Wah Choon Lee? [492] A. I did.

Q. What did you know about that person?

A. Knew him as a police officer of the Honolulu Police Department.

Q. Is he living now? A. He is not.

Q. When did you last see him or his body?

A. Last year, about August.

Q. Do you recall the date?

A. I think it was the 4th.

Q. Fourth of August?

A. I am not certain but I think approximate that date.

Q. Was he in person or his body?

A. No, I saw his body at the morgue.

Q. Just why were you looking at his body?

(Testimony of Robert B. Faus.)

A. I was called in to see him because I was City and County Physician. He had suffered an electric shock and he was dead.

Mr. Dwight: Just a moment. I am going to move to strike that answer of the doctor concerning an electric shock.

The Court: That may be taken as hearsay. It is stricken from the record and the jury asked to disregard it.

By Mr. Young:

Q. Now, would you know a picture of that body if you saw it again? A. I would.

Q. I show you Prosecution's Exhibits "B" and "C" in evidence. Will you examine those pictures, doctor? [493]

(Mr. Young handed the pictures, Prosecution's Exhibits "B" and "C", to the witness.)

A. (After examination of same) Yes, this is the body.

Q. Is that the body? A. It is.

Q. Now, doctor, what were your objective findings on that body? Did you examine the entire body? A. I did. I went over it.

Q. The exterior surface? A. Yes.

Q. What were your findings?

A. The only sign of external injury was an area on his thumb, this point on the right thumb.

(The witness indicates on Prosecution's Exhibit "C".)

(Testimony of Robert B. Faus.)

Q. Go ahead, doctor.

A. The superficial surface of the skin had been denuded therefrom as if it had been burned.

Q. It appeared to be burned?

A. It appeared to be an electric burn.

Q. Are you acquainted with electric burns?

A. I am.

Q. Does this picture, Prosecution's Exhibit "C", portray what you have testified to?

A. It does; the point at issue is on the right thumb.

Q. On the right thumb? A. Yes, sir.

Q. Did you have anything to do with the taking of this picture?

A. I did. I instructed the police officer—Fraga, [494] I believe, his name is—to show that, make note of that as the only signs of external violence on the body.

Q. Have you had any occasion to study the effect of electricity? Have you had any occasion to observe the effect of electricity upon the body?

A. I have.

Q. Doctor, I am going to ask you to assume that an electric three-way wire carrying a current and with a voltage of 115 volts has its source from a circuit arm of 4,000 volts on an Hawaiian Electric line fed from the Wahiawa substation; and assume further that this electric wire with a potential of 115 volts enters a house and that this line after passing through the fuse plugs is attached to

(Testimony of Robert B. Faus.)
and passes through a knife-type switch; that the two wires from the knife-type switch lead to a transformer, which steps up the voltage to 600 volts; that one of the wires leading from the transformer is attached to a screen on a screen door, which makes contact with a copper plate on the outside of the door; that another wire leads from the transformer to a pipe ground; assume further that there is an iron or metal door mat resting on a cement walk just in front of the door; and assume that it is raining; that the cement is wet; that the iron or metal door mat on the cement is wet; and assume, further, that a human being with leather-soled shoes dampened by water stands upon the iron or metal mat, which is resting upon the cement; and that this human being, a male 24 years of age, grasps the copper strip on the door fairly with his bare hands; would you have an opinion, doctor, based upon your know- [495] ledge and experience as a medical doctor, as to whether or not it would be dangerous to the life of the person so situated for another to close the switch while he was in that position?

Mr. Dwight: May I have my objection upon the same grounds stated; that the hypothetical question is based upon facts not in the record; facts entirely out of the record, never adduced in the trial, therefore an improper hypothetical question and therefore incompetent, irrelevant and immaterial?

The Court: You may. Objection overruled.

(Testimony of Robert B. Faus.)

Mr. Dwight: Save an exception.

The Court: Exception noted.

By Mr. Young:

Q. You have an opinion with those assumed facts? A. Yes, sir, I have.

Q. What is your opinion?

A. With the circuit closed, with a man standing on a metal door mat that is grounded, with wet feet and he completes the circuit by touching the plate on the door, he would receive the full charge of current available from that transformer and if that is as high as 600 volts, it would be imminently dangerous to life.

Q. It would be imminently dangerous to life?

A. Yes, sir.

Q. Would the opinion be any different if we assume the same set of facts, except that the person was standing upon wet cement?

A. Well, if he is grounded. That is all; that is sufficient. He is well grounded if he is standing on [496] wet cement and he would receive a shock dangerous to life.

Q. Would such a circuit be dangerous to life for anyone to touch it under these conditions?

A. In my opinion, it would.

Q. Now, doctor, assuming these facts and assuming the findings that you have testified to as to these burns upon the hands of the deceased, would you have an opinion as to whether or not this electrocution was caused by a contact with the door?

(Testimony of Robert B. Faus.)

Mr. Dwight: Objected to as incompetent, irrelevant and immaterial; upon the further ground that the hypothetical question has not been placed fully to the witness. It leaves me to an assumption. Counsel has asked two or three hypothetical questions with different facts. He turns around; I don't know what facts he is referring to and the witness naturally would be unable to know what facts he is referring to. For that reason I object.

The Court: Do you understand the question?

Mr. Dwight: Defendant ought to know what question you are talking about.

Mr. Young: The defendant is here.

The Court: Will you make it definite in that last question?

By Mr. Young:

Q. I will read another hypothetical question to you doctor: (Reading) Assuming that an electric three-way wire, carrying a current and with a voltage of 115 volts, has its source from a circuit arm of 4,000 volts on an Hawaiian electric line fed from the Wahiawa substation; [497] and assume, further, that this electric wire, with a potential of 115 volts, enters a house and that this line after passing through the fuse plugs is attached to and passes through a knife-type switch; that the two wires from the knife-type switch lead to a transformer, which steps up the voltage to 600 volts; that one of the wires leading from the transformer is attached

(Testimony of Robert B. Faus.)
to a screen on a screen door, which makes contact with a copper plate on the outside of the door; that another wire leads from the transformer to a pipe ground; assume, further, that there is an iron or metal door mat resting on a cement walk just in front of the door and assume that it is raining; that the cement is wet; that the iron or metal door mat on the cement is wet; and assume, further, that Wah Choon Lee, the body which you examined, when it was alive had leather-sole shoes, which were dampened by water, and that Wah Choon Lee stood upon that iron door mat, which is resting upon the wet cement, and that this Wah Choon Lee grasped the copper strip on the door firmly with his bare hand and that thereafter the switch was closed, completing the circuit, would you have an opinion, based upon your knowledge and experience as a medical doctor, as to whether or not the burn, which you have testified to on the hand of the deceased, was caused by such a contact——

Mr. Dwight: May I have my same objection and exception?

By Mr. Young:

Q. (Continuing) ——with the copper plate on the door?

The Court: Mr. Dwight may have his same objection. The Court overrules the objection. [498] Exception noted.

A. It is; it is my opinion that is where the current entered his body when the circuit was closed.

(Testimony of Robert B. Faus.)

Mr. Young: No further questions.

Mr. Dwight: No questions, doctor.

The Court: Excused, doctor.

Mr. Young: This is our last witness. It will only take a few minutes.

The Court: Last witness.

YOUNG CHOON LEE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your name, please?

A. Young Choon Lee.

Q. How old are you, Mr. Lee?

A. Thirty-three.

Q. Where do you live?

A. 835 19th Avenue.

Q. What is your descent, your nationality.

A. Korean.

Q. Are you full-blooded Korean?

A. Yes, sir.

Q. Did you have a brother by the name of Wah Choon Lee? A. Yes.

Q. Is he living now? [499]

A. No, sir.

Q. Would you know a picture of him if you saw it again, of his body? Take a look at this, Prosecu-

(Testimony of Young Choon Lee.)

tion's Exhibit "B" in evidence. Is that your brother, Wah Choon Lee?

(Mr. Young handed the picture, Prosecution's Exhibit "B", to the witness.)

A. (After examining the same) Yes, sir.

Q. How old was he at the time of his death?

A. Twenty-four.

Q. Do you know how his health was at the time of his death? A. He was in good health.

Q. When is the last time you saw him before his death? A. August 3, 1937.

Q. About what time?

A. About ten to six in the evening.

Mr. Young: Ten to six. No further questions.

Mr. Dwight: No questions.

The Court: Excused.

Mr. Young: If the Court will excuse me just a moment, I will check my record briefly. I have an Exhibit "H" that I offered in evidence. I believe your Honor has ruled against, that it will not be admitted in evidence.

The Court: That is correct.

Mr. Young: It is marked for identification. The Territory rests.

The Court: Let the record show the Territory rests.

The plaintiff rested [500]

Mr. Dwight: Just before the Territory rests, I would like to recall Mr. Caminos for the purpose of calling to his attention certain statements that he made for further cross examination, particularly the statements that he made, concerning the statement that he made as to the person opening the door.

The Court: Proceed.

Mr. Dwight: If counsel is willing to waive that and let me read from his evidence that was given on January 28, 1938——

The Court: 24th, that was.

Mr. Young: The territory has rested.

Mr. Dwight: I notified counsel before that I wanted to recall him.

Mr. Young: I think Mr. Caminos ought to see the statement.

Mr. Dwight: I don't want this jury to come back this afternoon. I have innumerable motions to make. I will withdraw my request that Caminos be recalled.

The Court: The prosecution has now rested.

Mr. Dwight: At this time I move to strike the testimony of Officer Burns or so much thereof as occurred subsequent to the time that he testified the defendant asked him what he meant by breaking into this house, to-wit, everything that he testified to subsequent to that point when the defendant entered the room downstairs upon the ground that the testimony is incompetent, [501] irrelevant and immaterial; upon the ground that it was procured

in violation of the defendant's rights under the Constitution, the 4th and 5th Amendments, and upon the further ground that at the time he was a trespasser upon the premises of the defendant in violation of the defendant's rights under the Constitution of the United States.

The Court: Motion denied.

Mr. Dwight: May I save an exception?

The Court: Exception noted.

Mr. Dwight: I move to strike the testimony of Lou Rodgers upon the ground that it affirmatively appears from the evidence that she was an accomplice; upon the further ground that the testimony of Lou Rodgers was discredited and for that reason cannot be accepted by this Court or by this jury. I further move to strike the testimony of Lou Rodgers upon the ground that any evidence that she may have given in this particular case was based entirely upon the electrical equipment that was ordered—the evidence—I will put it that way—the evidence that was suppressed, ordered suppressed by this Court and upon the further ground that her entire testimony was adduced at this trial from knowledge*d* gained by the searching officers and the law officers of the City and County of Honolulu when they made an illegal and invalid search in contravention of the defendant's rights under the Constitution. (To the Court) You want to rule on that? [502]

The Court: Motion denied.

Mr. Dwight: May I save an exception?

The Court: Exception noted.

Mr. Dwight: I further move to strike the testimony of Kiehm—I can't think of his first name—John Kiehm upon the ground that his evidence was given in violation of the defendant's rights under the Constitution and the 4th and 5th Amendments; upon the further ground that his entire evidence was procured as a result of information gained by the law officers after making an illegal search of the premises of the defendant in violation of her rights under the Constitution and that all of Mr. Kiehm's testimony was procured from that particular knowledge and from no other source whatsoever; and upon the further ground that the evidence affirmatively appears that Mr. Kiehm was an accomplice in this particular case and that his testimony was discredited in this Court and that, therefore, his testimony becomes incompetent, irrelevant and immaterial for any purpose.

The Court: Motion denied.

Mr. Dwight: Save an exception.

The Court: Exception noted.

Mr. Dwight: I further move to strike the testimony of Penland, Miss Penland, upon the ground that her evidence given here was obtained and knowledge of those facts that she testified to were obtained in violation of law and violation of the rights of the defendant under the [503] Constitution of the United States; upon the further ground

that the defendant—I mean that Miss Penland—the evidence affirmatively shows Miss Penland to be an accomplice and that her testimony before this Court has been discredited and that her testimony, therefore, becomes incompetent, irrelevant and immaterial for any purpose in this case.

The Court: Motion denied.

Mr. Dwight: I have already made my motions to strike the doctors' testimony.

The Court: Yes, you have.

Mr. Dwight: At this time, may it please the Court, I move that the Court direct the jury to return a verdict of not guilty upon the ground that the evidence—Before I make that motion, may it please the Court, I will ask the prosecution to elect upon which count of the indictment they intend to proceed.

Mr. Young: That is not being submitted to the jury. I submit the original case of 11 Hawaii and leave it up to your Honor's discretion.

The Court: Looking over the counts, do you want to——

Mr. Young: We want to submit it to the jury.

Mr. Dwight: I take it, the record shows the prosecution refuses to elect.

Mr. Young: At this time.

Mr. Dwight: At this time. I save an exception to the refusal of the prosecution to elect and assign that as error. [504]

Mr. Dwight: Now, at this time I move for a directed verdict of not guilty upon the ground that

the evidence fails to prove beyond a reasonable doubt that the defendant in this case at the time and place mentioned in the indictment killed or murdered Wah Choon Lee; upon the ground that there is no evidence tending to show malice; that the record in this case fails to show — affirmatively shows, if it please the Court, that if the installation of this equipment was the cause of death, that the evidence affirmatively shows lack and entire lack of criminal intent; upon the further ground that the prosecution has failed to prove beyond a reasonable doubt criminal intent of this defendant at the time; upon the further ground that the crime committed in this case was justifiable in that Wah Choon Lee at the time that he met his death was a trespasser; upon the further ground, may it please the Court, that the evidence affirmatively shows that the electricity did not kill Wah Choon Lee; that the prosecution has failed to prove that electricity from that door killed Wah Choon Lee; upon the further ground, may it please the Court, that no valid arrest was made by Officer Burns or by any police officer under the laws of the Territory of Hawaii, and for that reason Wah Choon Lee and the police officers were trespassers upon the premises of the defendant in violation of her rights under the constitution; upon the further ground, may [505] it please the Court, that section—can I have the Revised Laws?—several sections——

The Court: 5404 is one of them.

Mr. Dwight: (Continuing) that Sections 5404 and 5403 of the Revised Laws of Hawaii 1935 is unconstitutional and void, if it is applicable in this case, in that it contravenes the amendment to the Constitution that provides for security of persons in case of arrest, which is the 4th Amendment; upon the further ground, may it please the Court, that these sections contravene the common law of the United States and must be strictly construed; and upon the last and final ground that the prosecution has failed in all respects to show a violation of any law of the Territory of Hawaii by the defendant in this case. I will argue it at any time convenient to the Court. I will argue.

Mr. Young: If the Court is ready to rule, I am ready to listen.

The Court: Motion denied.

Mr. Dwight: Do I understand that the Court has denied the motion?

The Court: Yes.

Mr. Dwight: Very well, save an exception.

The Court: The exception may be saved and noted. The matter of continuance?

Mr. Dwight: Monday morning.

The Court: Monday morning, nine o'clock. The Court stands adjourned until Monday morning [506] at nine o'clock. Under the same instructions, the jury is not to discuss this case with any outsider. Report any indiscretions. The Court stands adjourned until Monday morning at nine o'clock.

(A recess was taken until Monday, February 14, 1938, at nine o'clock a. m.) [507]

Honolulu, T. H., Feb. 14, 1938.

(The trial was resumed at 9:20 a. m.)

The Clerk: Criminal 14,332 Territory of Hawaii vs. Ilene Warren alias "Speed" Warren.

Mr. Young: *Read* for the Territory. Stipulate the defendant and the jury are present.

Mr. Dwight: So stipulated. We are ready for the defendant.

The Court: Let the record so show. Mr. Clark, will you read the Court's instruction to the jury in reference to a view of the premises?

(The reporter read as follows:)

> "The Court: The Court has learned that the jury desires a view of the premises and that neither attorney objects to this view. The Court, therefore, orders a view of the premises immediately and will be back here by twelve o'clock noon. The purpose of the view is to have you observe the premises, the buildings, and the arrangement of the rooms and staircases and doors in order to assist in considering the testimony and the evidence of the various witnesses. You must understand that your view is simply for the purpose of observing distances and the general arrangement of the house and grounds. You are instructed that you cannot search for evidence to support or to override any testimony in this case. You must not observe or take into consideration the arrangement of the furniture and fixtures as you ob-

> serve them today or any marks or the location [508] of any fixtures attached to the building. Gentlemen of the Jury, you cannot observe, consider or look for any marks or any fixtures within the building."

The Court: Upon the return back to Honolulu the Court will adjourn until nine o'clock tomorrow morning. The Court now adjourns and asks the jury to prepare themselves to leave immediately for Wahiawa on one of the Rapid Transit buses.

> (The jurors left the court-room and boarded a Rapid Transit bus parked in front of the court house.)

In Chambers

(Respective counsel being present in chambers, the following proceedings were had:)

Mr. Dwight: The defendant having her own transportation, I will accompany the jury and the defendant will go to Wahiawa in her own automobile.

The Court: You wish her to go separately in her own automobile. You have no objection?

Mr. Young: I have no objection.

The Court: The Court permits the defendant to ride independently in her own car. She will wait for us at the Wahiawa Station. If she doesn't appear, it is *assume* she has waived it.

Mr. Dwight: I don't know whether I will catch her outside.

(At 9:37 a.m. the Court, the jury, Mr. Young, Mr. Dwight, Bailiff Louis Kahanamoku, Investigator John Jardine, Mrs. Olga Sezenevsky, Clerk of the [509] Court, and Mr. George R. Clark, Shorthand Reporter, left by Rapid Transit bus from the front entrance of the Judiciary Building for the premises of the defendant on Muliwai Street at Wahiawa. At 10:30 o'clock a. m. the bus arrived at the Wahiawa court house on California and Kuahiwi Avenues and parked there a few minutes. The Court, Mr. Dwight and Mr. Young alighted from the bus and spent sometime at the court house and vicinity. At 10:58 o'clock a. m. the Court, Mr. Dwight and Mr. Young returned to the bus and it was stipulated the jurors were all present. Thence the bus proceeded and turned right into Kuahiwi Avenue to a point on said avenue directly makai of the defendant's premises and came to a stop. Thereupon the following proceedings were had:)

The Court: Now, gentlemen of the jury, in viewing anything on the premises or in the house you are not to comment at all, even amongst yourselves, and not to point anything out. View the premises and house silently. If you want to ask any questions, call them to the attention of the Court in the presence of the entire jury, the defendant and the attorneys. Don't talk or point out anything among yourselves.

Mr. Dwight: Or talk with anybody else.

(At 11:00 o'clock a. m. the bus started, thence proceeding along Kuahiwi Avenue, turning left and crossing the railroad track around the bend, thence continuing to the left in the Waia- [510] lua direction into Muliwai Avenue and came to a stop and parked upon Mr. Dwight saying: "Stop right here by the sisal plant (on the left-hand side)". Thereupon the Court, the jury, both attorneys, the clerk, the bailiff, Investigator Jardine and the reporter alighted from the bus, viewed the sisal plant and surroundings, thence proceeded through the walk leading in the front entrance of the premises of the defendant, were met at the front door by the defendant, thence into the sitting room downstairs to the right of the entrance, thence up the stairway by the front entrance, into the parlor upstairs, arriving at 11:07 o'clock a. m. At 11:15 o'clock a. m. the Court, counsel, the jurors and court staff completed an examination of the upper floor and the entire premises and returned to the bus. Upon inquiry by the Court whether there was anything further the jurors desired to view, there was no response. Thence the bus proceeded along Muliwai Avenue to and turning left into California Avenue, thence along the same into Kamehameha Highway, thence along same and to the Judiciary Building and court-room at 11:45 o'clock a. m. Thereupon the following proceedings were had:)

The Court: You have no objection to adjourning without the presence of the defendant?

Mr. Dwight: I will so stipulate that the Court may adjourn in the absence of the defendant.

The Court: Let the record so show. The Court [511] will adjourn until tomorrow morning at nine o'clock. The jury will follow the same instructions not to discuss the case with any outsiders. Adjourn until tomorrow morning at nine o'clock.

(A recess was taken until Tuesday, February 15, 1938, at nine o'clock a. m.) [512]

Honolulu, T. H., February 15, 1938.

(The trial was resumed.)

The Clerk: Criminal 14332 Territory of Hawaii vs. Ilene Warren alias "Speed" Warren.

Mr. Young: Ready for the Territory. Stipulate the defendant and jury are present.

Mr. Dwight: Ready for the defendant and so stipulated.

The Court: Let the record so show.

Mr. Dwight: May it please the Court, at this time I would like to read to the jury the questions and answers of Caminos on cross-examination concerning the one fact as to who opened the door. I am reading from the official Transcript of the Proceedings Had and Testimony Given at the Hearing on Defendant's Motion to Suppress Evidence and for the Return of Property, certified to, may it

please the Court, by George R. Clark, the Official Shorthand Reporter of this Court.

(Mr. Dwight read as follows:)

"Q. You say 'Speed' opened the door?

A. Yes.

Q. You are sure about that?

A. I am sure about that.

Q. You are sure this man Burns was behind in that little entryway?

A. In the front part, inside."

Mr. Dwight: I will take the stand. [513]

Witnesses for the Defendant

CHARLES B. DWIGHT,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination:

My name is Charles B. Dwight and I am licensed to practice in all the courts of the Territory and have been so licensed since November 1922. I was born here, raised in the Territory, educated in the public schools, at Georgetown University. I am admitted not only in all the Courts of Hawaii but in the United States,—the Ninth Circuit Court of Appeals, Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia and the United States Supreme Court. I have served as Secretary to the Delegate to Congress, the late

(Testimony of Charles B. Dwight.)
Prince Kalanianaole, from 1919 until his death. I, by resolution of Congress, was placed in charge of the Office of the Delegate and then I served as Secretary to the Honorable Harry Baldwin, Delegate to Congress from Hawaii. I have also served as Deputy Attorney General of the Territory of Hawaii, in charge of criminal prosecutions, and served as such from 1923 until August or September of 1926. Subsequent to 1926 I engaged in the general practice of law in private practice. The other day, gentlemen, I admitted to you that I was Mrs. Warren's counsel for eleven years. In checking that record, I find that Mrs. Warren first came into my office with her son, who had just come back from college, on April 24, 1932. She came in then concerning the acquisition of some property to establish a business store [514] and restaurant on the highway leading to Schofield Barracks Gate. That proposition did not go through because of formal complaints made by the authorities, and the boy returned to college. She has been in to see me on several other occasions concerning professional matters. On the 4th of June, 1936, she came into my office with Miss Rodgers and was in my office but a few minutes concerning the bond fee that had been charged by the bondsman who bailed the defendant Penland out of jail. The case had been set for trial in the Wahiawa District Court for the 9th of April —9th of June, 1936. I requested that Miss Penland return to my office and at that time give me the in-

(Testimony of Charles B. Dwight.)

formation relative to the charge. She came back into my office on June 8th, at which time we discussed her connection with the case, because she was the only one involved in the case.

Mr. Young: If your Honor please, at this point I object to the conversation in the office, unless the record shows that the defendant waives the privilege of communication between counsel and client.

Mr. Dwight: I am not disclosing the nature of the conversation. I do not intend to violate the oath and violate any of the ethics of my profession. I do not intend to disclose confidential communications.

Mr. Young: I withdraw my objection.

The Court: Proceed.

Mr. Dwight: (Continuing) After the conversation was had, I then informed Miss Rodgers that she—[515] that we would demand a jury trial in her case and that we would move to dismiss as to the other defendants. They left the office and Miss Penland never returned to my office until the 9th—the 11th of September, 1936, at which time she was still residing with Mrs. Warren. At no time did any conversation occur in my office in connection with any electrical apparatus or the installation of any apparatus of any kind. Nothing, even in the nature of the establishment of any electrical apparatus, in conversation occurred at that time or at any time, either between me and Mrs. Warren and me or Miss

(Testimony of Charles B. Dwight.)
Rodgers or myself with either or both of them together. I have a rule in my office that any person that comes into that office must disclose his name and the nature of his business and that name is taken and the time when he comes is put down. If any further information is requested, I give that information to my office. I keep it on a card similar to the card that I had in court the other day and it contains the name of the person, the time of the visit and the purpose of the visit. I have kept that card system for eleven years and I do refer to them at times. I had Mrs. Warren's card in court the other day and I have been looking for it. I think it is up in the Supreme Court Library because I left here and went up and looked at the books, or I would have had it here this morning. Now, concerning the rule in my office, I also have a rule, which is rigidly enforced, which if people not of good business repute come into my office, that my private office door is kept open; if anyone in my office closes that door, [516] that the girls in the office come in there under the guise of getting a check or book there, under instructions to keep their eyes open or ears open. Now, at no time did Mrs. Warren ever say to me as she was leaving my office, as she was going out in the hall, that she was going to electrify the house, and that I answered "Okay by me." I think that is all.

(Testimony of Charles B. Dwight.)

Cross Examination

By Mr. Young:

Q. Mr. Dwight, isn't it a fact that Miss Rodgers was for a time your client?

A. She was. Miss Rodgers was my client from the 4th day of June until after the trial in Wahiawa and in that respect I might add that the trial did not take place on the 9th day of June. It was continued by the judge until the 12th day of June, then I went to Wahiawa and was in the court-room and there in the court-room I again met Miss Rodgers, and that was when I demanded the trial by jury. That was the end of the case; they nolled the case.

Q. Has she ever engaged you professionally before the 4th day of June, 1936? A. Yes.

Q. Didn't you just say that was the first time?

A. In connection with this matter, Miss Rodgers came in to see me in December of 1935. She had been in two automobile accidents, one accident that occurred on Kapiolani Boulevard when she was riding in an automobile that was pushed off the road by one of those big buses, and then the other accident that occurred prac- [517] tically at the same time. In each one she got slight injuries and got treatment. Then she was in another automobile accident up here in McInerny tract. She was riding in a car that collided with another automobile.

Q. So you did act as her attorney before the 4th day of June?

(Testimony of Charles B. Dwight.)

A. I did. I prepared a suit and she signed it but she never brought the costs and the suit was never filed.

Q. Now, when she visited your office before the 4th day of June, did you close or did not close the doors on the various occasions she had been there?

A. I have never had my doors closed at any time she was in my office.

Q. You considered her a person of ill repute?

A. Yes.

Q. Have you ever closed the doors when "Speed" Warren visited your office? A. Yes.

Q. For the same reason that you kept it open in regard to Miss Rodgers?

A. What is that?

Q. You kept the door open for the same reason that you kept it open in regard to Miss Rodgers?

A. Anybody but a reputable business man; anyone except my good business clients, I didn't.

Q. I mean before the trial started did you consider her reputable?

A. Yes, I considered her reputable.

Q. But you still left the door open?

A. Why, certainly. [518]

Q. Letting the door open or closed is really no test of what you consider a person to be?

A. Unless they are business people and connected with business offices or when you came in or when anybody like you came in or anybody connected with any decent business establishment down-

(Testimony of Charles B. Dwight.)

town, that door is open. The door is closed if we want to talk confidentially.

Q. And so if it is a decent business man, president of a bank, you wouldn't let your private secretary listen?

A. They have the files; they have the records; they have the notes on the statement.

Q. Do you usually close the door or do you not close the door?

A. Generally I keep the door open.

Q. Is that true at all times?

A. Generally at all times. If somebody comes in that wants to talk confidentially and somebody of good repute, that door is closed. That has been my practice.

Q. There has been some evidence in this case that you had a conversation with "Speed" Warren concerning a raid out there in the first part of June, 1936. Do you recall any such conversation?

A. No, the only conversation that we had concerning the raid in June was the conversation that we had on the 4th of June; that was concerning the bail money and the conversation on the 8th of June concerning the method by which we would approach our defense in the pending cases in the District Court.

Q. Now, Miss McGuire testified her instructions were with "Speed", in case of a raid, to call you. Did you [519] ever have any such arrangement with "Speed"?

(Testimony of Charles B. Dwight.)

A. No, excepting she was my client.

Q. Did you ever have any arrangement in case of a raid to call you immediately? A. No.

Q. You deny it? A. I deny it.

Mr. Young: Now, Mr. Dwight, will you please answer my questions? On my questions, please confine your answers to my questions?

Mr. Dwight: Will you address the Court, Mr. Young?

By Mr. Young:

Q. You say that you do not have those cards in Court that you kept in regard to Mrs. Warren?

A. I did have them the other day.

Q. How about Miss Rodgers? Did you have them, too?

A. I did have Miss Rodgers' card; Miss Penland, I have; Mrs. Warren's card for 1932 up to 1936. I think Mrs. Warren has probably two or three cards; each runs right down, fill up the card, take card 2 and card 3.

Q. You remember personally that Miss Rodgers was in your office?

A. I know definitely. First, she came in; she couldn't talk; she *same* some kind of a pain in her chest. I remember that definitely. She wanted to sue somebody and sue somebody quickly because they were wrong. I remember that distinctly. I got the facts from her companion but I can't recall whether he was driving the car she was in or

(Testimony of Charles B. Dwight.)
whether he was her companion at [520] the time or whether he was driving or witnessed the accident. I remember distinctly there was a Japanese boy that came in with her. He was either the driver of the car or riding in the car when she was hurt. I got the facts from him and prepared the suit. She came back several days later and signed the complaint, which I had the other day. That was in December, then she went away; I never saw her again.

Q. Well, do you remember whether or not on each occasion she was in there the door was open or closed?

A. I can only recall that from my general routine.

Q. Practice? A. Yes.

Q. In other words, your general rule is to leave the door open?

A. Yes, and for my stenographers to keep their ears open. If the door was closed, one of those girls will come right in and open it.

Q. Is it possible the door might have been closed for a very short time on some visit of Lou Rodgers?

A. I don't think so because one look at her, you could see.

Q. All the time "Speed" has been to your office —I believe you testified she has been your client since 1932? A. Yes.

Q. Do you recall whether the door has ever been closed when she has been in your office?

(Testimony of Charles B. Dwight.)

A. It has been closed since this indictment has been brought by the Grand Jury. You want me to explain the reason? [521]

Q. If you want to tell the jury.

A. Information got out from my office into yours.

Q. That is your conclusion.

A. That is my assumption.

Mr. Young: I ask this answer be stricken as a conclusion of the witness; that is a conclusion that information got to our office.

By the Court:

Q. That is your conclusion?

A. Yes, that is my conclusion; the conclusion is the reason.

The Court: The jury is instructed that statement is really the reason.

A. And I might add, it was neither you nor Mr. Jardine that carried the news.

Mr. Young: I still ask this be stricken and the jury instructed to disregard it.

The Court: The Court has already instructed the jury. The motion is denied. The jury will not take his conclusion as evidence, will disregard it as evidence but merely as his reason.

By Mr. Young:

Q. If I understand your testimony correctly, Mr. Dwight, before June 4th or rather before the date of the indictment, if that was your answer, to

(Testimony of Charles B. Dwight.)

your best recollection, the doors in your office had never been closed in your office while "Speed" Warren was in a conference in the office with you; that is your testimony?

A. That is my testimony; that is correct. There may have been sometime when the doors were closed. If [522] they were closed, it wasn't very long before a girl came in and opened it.

Q. But there might have been something said while the doors were closed?

A. Might have been.

Q. You can't recall from the date of the indictment. June 4th, when Miss Rodgers and "Speed" Warren came in there, do you recall whether or not "Speed" Warren had been in your office from the date of the indictment?

A. You mean murder indictment?

Q. I mean from June 4, 1937, until the date of the indictment, which was sometime in August.

A. Yes, she was in on the 9th day of September —I mean on the 11th day of September.

Q. Do you recall whether or not the door was closed at that time?

A. No, you mean—you are speaking of the raid in June?

Q. June 4th of 1937.

A. Of last year?

Q. When Lou Rodgers came into your office about equipment—that was in 1936—up until the

(Testimony of Charles B. Dwight.)
date of the indictment, which was August, 1937, had "Speed" Warren been into your office?

A. Yes.

Q. Approximately how many occasions?

A. She was in in September; she was in in November—she did not, she came in early in December, then she didn't come in until the middle of January.

Q. Do you recall whether or not on those occasions [523] the door was closed or open when she was in there?

A. I don't but I would say that they were generally open. There might have been an instance where it was closed.

Q. It might have been, might not, that is your best recollection?

A. During that period it might and it might not have been Mrs. Warren by herself.

Q. Whey is it you distinctly remember on June 4th it was definitely open and on other occasions you are not so sure?

A. Because when any prostitute—I am speaking of Miss Penland and Miss Scott—comes in, the instructions are to keep their ears open.

Q. Lou Rodgers came in with "Speed" Warren?

A. She did come in with "Speed" Warren; she was the one that caused the doors to remain open.

Q. You left them open because of Miss Rodgers?

A. Yes.

(Testimony of Charles B. Dwight.)

Q. Your practice had been before that date to leave them open with "Speed" Warren, too?

A. I generally leave them open. If "Speed" came in, they might have been closed. I know one day that Mr. Jardine came into my office, but when Mr. Jardine came into my office the door was being opened and Mrs. Warren was walking out, shortly afterwards being opened by a girl in the office.

Q. Now, as Mrs. Warren's attorney, did you know what her business was on the 4th day of June, 1937?

A. Yes, I knew what her business was. [524]

Q. On the 4th day of June, 1937?

A. Yes, I did.

Q. Do you know what her business was just prior to the indictment of August, 1937?

A. I had no idea. She communicated with me concerning the incidents of the 4th of June.

Q. Do you know where she has lived?

A. The same place; she has lived there for the last eleven years.

Q. To your knowledge she has lived there all the time?

A. Are you speaking of recent time?

Q. Up until 1937.

A. From 1936—I will put it this way: On June 4, 1936, she was living on Muliwai Street; on August 3rd—Is that the date that you want?

Q. August 3, 1937, please.

(Testimony of Charles B. Dwight.)

A. August, 1937, she was living on Muliwai Street.

Q. Did you know what her business was on that date, August 3, 1937, or August 2, 1937?

A. I couldn't say definitely because she did not tell me.

Q. Did you know of your own knowledge?

A. No, I did not know of my own knowledge.

Q. You had no idea of what type?

A. Certainly I had an idea.

Q. But she had never told you?

A. She never told me. I knew what her business was on June 4, 1936.

Q. You knew what her business was then?

A. Certainly; she told me. [525]

Q. Did she tell you at any time after that on any of her conferences with you what her business was from June 4, 1936, to August 3, 1937? Did she at any time communicate the nature of her business?

A. No, never communicated her business.

Q. From June 4, 1936, until August 3, 1937, did she seek advice concerning her business?

A. No, never. What do you mean by "business"?

Q. Any business she was in.

A. I told you she came down with her son concerning establishment of a store; she came down regarding the establishment of a store; she came down regarding the payments of the costs of the building. I did not tell you about her son making

(Testimony of Charles B. Dwight.)

the application because of the protests by the Chief of Police against the license filed in the Liquor Office. She was denied a license. They came in concerning the sale of the property to a Chinese person that runs the store in Wahiawa. The Chinese bought the business and the property from them and there was a suit subsequent to that concerning the question of compensation insurance, as to whether she was liable for compensation insurance; I mean in the operation of the store, which she really didn't get to operate; that we discussed that at various times.

Q. I take it, that is the only nature of the business that you had with her? A. Exactly.

Q. Never any conversation or anything of what she was doing upon the premises there?

A. There was absolutely nothing about what she was [526] doing on the premises or anybody.

Q. She never consulted you from June 4, 1936, until August 3, 1937, about that matter?

A. Yes, that is true. She never consulted me about anything else except what I have told you about.

Q. After August 3, 1937, did she tell you what the nature of her business had been out there?

A. She did.

Q. Now, did Lou Rodgers ever come in with "Speed" to your office, other than on that one date on June 4, 1936? A. June 8, 1936.

Q. I think your testimony was she had on June 4th?

(Testimony of Charles B. Dwight.)

A. June 4th was the first time. You asked for the other times.

Q. Yes, if she had been in with "Speed".

A. Yes, she came in on June 4th, on June 8th and on the 11th day of September, 1936, and she has never been into my office after the 11th day of September, 1936.

Q. I take it then, from your testimony, Mr. Dwight, that you deny it?

A. And, of course, this time when this automobile accident that I talked about here, an automobile in which she and Mrs. Warren were riding, that automobile accident; they were both in the car. I am speaking of the one on Kapiolani Boulevard. Mrs. Warren's car was going out towards Wahiawa; it was in the early evening, just after dusk, and the Honolulu Motor Company coach was coming in from Schofield, rather, from Pearl Harbor, was passing another car, swerved way over and forced Mrs. Warren's [527] car out into the ditch and went down into a hole on the side of the road. The accident with the Japanese was up on Alewa Heights.

Q. And at that time you don't know what type of business Mrs. Warren was operating at her home or whether she was operating any business to your knowledge?

A. As far as I know, she was operating a legitimate restaurant business.

Q. And nothing else?

(Testimony of Charles B. Dwight.)

A. I think they called it the Highway Cafe.

Q. And nothing at her home?

A. Nothing at her home.

Q. At that date? A. At that date.

Q. But you did know at that date Lou Rodgers was a prostitute? A. June 4th?

Q. No, at the time they came in at the time of the automobile accident.

A. No, except she looked the part. The first time I knew she was a prostitute was when she told me.

Q. On the 4th of June?

A. On the 4th of June, 7th, 8th of June.

Q. I understand from your testimony, Mr. Dwight, that you deny that Lou Rodgers—you do not deny that Lou Rodgers came into your office and "Speed" Warren, the defendant, came into your office? A. Yes.

Q. But you deny at that time there was any conversation for the purpose of keeping drunks, soldiers and [528] police away?

A. I absolutely deny that.

Q. You deny as they were leaving you said it was "Okay with me; I don't think they can do anything to you"?

A. Yes, I absolutely deny that.

Q. And at no time had "Speed" Warren ever consulted you concerning the operation of any type of business upon her premises at Muliwai Street?

A. Yes, sir. I deny that. The only time any conversation occurred concerning the operation of anything at Muliwai Street was in connection with any

(Testimony of Charles B. Dwight.)
pending matter that was in Court at the time, to-wit, the pending matter of June, 1936, and the pending matter as the result of this incident of August 3rd. I had no concern.

Mr. Young: No further questions.

The Court: Redirect?

Mr. Dwight: I can't redirect myself. Mr. Young, will you take the stand?

Mr. Young: Rather unusual procedure.

Mr. Dwight: Please take the stand?

KENNETH YOUNG,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dwight:

Q. What is your name?

A. Kenneth Young.

Q. And what is your official position?

A. Assistant Public Prosecutor, City and County of Honolulu. [529]

Q. And as such, have you knowledge of all prosecutions instituted by your office against people who allegedly commit crimes in this jurisdiction, City and County of Honolulu?

A. I do not under the present system that we have. It just depends which prosecutor presents cases to the Grand Jury, and the work is divided between the prosecutors there and some cases I

(Testimony of Kenneth Young.)

have absolutely no knowledge of. The cases I do have knowledge of are cases I work on.

Q. Will you state whether or not a formal charge of murder in the second degree has been lodged against Lou Rodgers for the death of Wah Choon Lee on August 3, 1937? Will you state, from your knowledge and experience?

Mr. Young: I object to the question as calling for my conclusion and not a matter I have any peculiar knowledge of. It is based upon hearsay. The proper source is other places. May I answer the question?

The Court: Read the question.

Mr. Dwight: I will withdraw the question.

The Court: The question is withdrawn. There is nothing before the Court.

By Mr. Dwight:

Q. Can you state whether or not a formal charge of murder in the second degree has been lodged by the Office of the Public Prosecutor against Lou Rodgers for the death of Wah Choon Lee on August 3, 1937?

Mr. Young: I object to the question as being incompetent, irrelevant and immaterial. Whatever is being placed against Lou Rodgers is not material [530] to this case; further, it is calling for a conclusion of myself. I have no basis for giving any more.

Mr. Dwight: I submit it on the question of accomplices. That goes to the credibility of the witnesses.

(Testimony of Kenneth Young.)

The Court: Objection overruled—Just a minute. Withdraw that. I sustain the objection.

Mr. Dwight: May I save an exception?

The Court: Exception noted.

By Mr. Dwight:

Q. Will you state whether or not, within your own knowledge as Assistant Public Prosecutor of the City and County of Honolulu, that any charge of murder in the second degree—was any charge of murder in the second degree lodged against Lou Rodgers in connection with the death of Wah Choon Lee on August 3, 1937?

A. Counsel insists upon asking the question. I have no knowledge of any charge being placed. I do not know. It is not my official duty to know those things.

Q. Will you state whether or not, as Assistant Public Prosecutor of the City and County of Honolulu, that formal charges of murder in the second degree have been placed against Kiehm, the witness that was on the stand here, in connection with the death of Wah Choon Lee on August 3, 1937?

Mr. Young: I object to the question as incompetent, irrelevant and immaterial, not within the issues of this case as to what charges have been placed against anyone else. It is calling [531] upon the witness for a conclusion, which I cannot give. I submit the question is improper and incompetent.

Mr. Dwight: May it please the Court, the question of the weight of testimony to be given to ac-

(Testimony of Kenneth Young.)
complices is very material in a case of this kind and the jury have a right to get all of the facts upon the question of whether or not certain witnesses were accomplices, and if they were, they are entitled to receive from this Court a certain instruction in regard to that type of testimony and that is the reason why I submit it is vital in a case of this kind.

The Court: Objection sustained.

Mr. Dwight: Save an exception.

The Court: Exception noted.

By Mr. Dwight:

Q. Will you state, Mr. Young, as Deputy City and County Attorney, whether or not any charge of prostitution—I mean any charge of being a common prostitute or of vagrancy or of maintaining a house of prostitution has been lodged against Miss Penland since the 3rd day of August, 1937?

Mr. Young: Same objection, your Honor. This is a case of murder, not prostitution. It is not a matter within my knowledge.

The Court: Objection sustained.

Mr. Dwight: May I save an exception?

The Court: Exception noted. [532]

By Mr. Dwight:

Q. Then, I take it, Mr. Young, you refuse to disclose?

Mr. Young: Your Honor, the Court has ruled on this matter. Counsel has no right to argue with the witness.

(Testimony of Kenneth Young.)

Mr. Dwight: I am not arguing with the witness.

The Court: The Court has ruled the question is improper. Withdraw your question; it is not proper.

By Mr. Dwight:

Q. The Court has ruled those two questions are improper. Now, I am asking you whether you refuse to state whether the information was filed. I didn't say why.

Mr. Young: He (indicating the Clerk) is the proper man if you want to prove that.

The Court: Objection will be sustained.

Mr. Dwight: May I ask the remarks of counsel be stricken from the records and that the jury be ordered to disregard the remarks of the witness?

Mr. Young: I have no objection to that being stricken.

The Court: I take it, those remarks and any other remarks so made as her attorney will not be considered by the jury and these particular remarks will be stricken from the record.

Mr. Dwight: That is all.

Mr. Young: Thank you. [533]

Mr. Dwight: Now, may it please the Court, by way of inquiry, will the Court instruct the jury in regard to judicial notice of this Court's official acts? I will withdraw that. (To the Clerk) Mr. Wilder, please bring all the criminal records in?

May we take our recess at this time? By that time, I will see Mr. Wilder and save a lot of questions.

The Court: The Court stands in recess.

(A brief recess was taken.)

Mr. Dwight: Mr. Young, you have no objection to Mr. Wilder remaining in Court while Mr. Paulos is on the witness stand? Call Mr. Paulos.

(There was no response, but acquiescence.)

JACINTO PAULOS,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dwight:

Q. Sit down, Mr. Paulos. Mr. Paulos, what is your name? A. Jacinto Paulos.

Q. Where do you work?

A. Any place I can find a job.

Q. Where do you work now?

A. Reservation, Army.

Q. And where do you live? A. Wahiawa.

Q. Do you know where Mrs. Warren lives?

A. Wahiawa. [534]

Q. You know where she lives? A. Yes.

Q. Where do you live with reference to that?

A. Yes, one lot between me and her.

Q. On the same side of the street; that is the brown house? A. Yes, sir.

(Testimony of Jacinto Paulos.)

Q. Mr. Paulos, have you ever seen any "No Trespassing" signs on the premises of Mrs. Warren? A. Yes, sir.

Q. Where did you see those signs?

A. About twelve or fourteen feet out from the government road on his own property.

Q. Inside the property? A. Yes.

Q. Is there any there now? There is one there now? A. Yes, all the time.

Q. Now, with reference to that one there now, you say it is inside the property line of Mrs. Warren? A. Yes.

Q. How long have you seen that sign there?

A. I see about four or five years that sign there.

Q. Could you see it rather easily? Anybody walking up and down, anybody could see that sign?

A. Suppose we come down we see it easy.

Cross Examination

By Mr. Young:

Q. Mr. Paulos, when did you see that sign?

A. Last time yesterday.

Q. Did you notice the color of that board? Was it [535] clean or dirty?

A. Sometimes clean, sometimes dirty.

Q. How was it yesterday when you seen it yesterday?

A. Some places dirty, some places clean.

Q. The part has "No Trespassing", was it clean?

(Testimony of Jacinto Paulos.)

A. Some parts clean, some dirty.

Q. What is that *signed* attached to?

A. Nobody can go in.

Q. Mr. Paulos, is that sign nailed on to something? is it lying on the ground?

A. 1 x 4 board.

Q. Did you notice the condition of that 1 x 4? Is it clean? A. Kind of dirty.

Q. Which was the dirtiest, the 1 x 4, or the sign? A. 1 x 4 is more dirty.

Q. The sign was not so dirty?

A. Not so dirty.

Q. Has that same sign been there all the time or different sign?

A. Sign been there; somebody drop it down and change.

Q. When was it changed?

A. About two years ago.

Q. About two years ago. The present sign has been there for two years, the board with "No Trespassing" on it? A. Yes.

Mr. Young: No further questions.

Mr. Dwight: That is all. Mr. Wilder, will you take the stand, please. [536]

HARRY A. WILDER,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dwight:

Q. Will you state your name?

A. Harry A. Wilder.

Q. Mr. Wilder, you are the official chief clerk of this division of the Circuit Court?

A. Yes.

Q. And this division of the Court has charge of criminal prosecutions in this Circuit?

A. It has at the present time and since January 10th of this year.

Q. And you have with you, have you not, the docket of criminal cases pending against residents of this jurisdiction?

A. I have the criminal docket here of cases filed since August 1 or August 3, 1937, up to the present time.

Q. Have you examined that docket to ascertain if a charge of murder in the second degree has been lodged against Lou Rodgers?

Mr. Young: I object to this as incompetent, irrelevant and not within the issues of this case. Your Honor, what difference does it make?

Mr. Dwight: I submit it is very material in this case in the determination of the question of whether or not Miss Rodgers was an accomplice and this is very vital in that respect. Of course,

(Testimony of Harry A. Wilder.)

should it develop that Miss Rodgers was an accomplice, then this Court is bound now within the [537] evidence to instruct the jury in relation to the weight of testimony to be accorded an accomplice.

The Court: Objection sustained.

Mr. Dwight: Save an exception.

The Court: Exception saved.

By Mr. Dwight:

Q. Then, I will repeat the three questions, your Honor. Mr. Wilder, do the records disclose any charge of any nature from August 3, 1937, against either Miss Rodgers or John Kiehm?

Mr. Young: Object to the same again as not being within the issues of this case, as being irrelevant.

Mr. Dwight: I submit, if the Court please, it is the greatest issue in this case, the credibility of the witnesses.

The Court: Objection sustained.

Mr. Dwight: May I save an exception?

The Court: Exception saved.

Mr. Dwight: I offer to prove by this witness——

Mr. Young: I object to any offer of proof.

Mr. Dwight: I make two offers of proof so that we can save an exception. I offer to prove by this witness that the records of the Circuit Court of the First Circuit show that up to the present time no charge or indictment or information, charging Lou

(Testimony of Harry A. Wilder.)
Rodgers with the crime of murder in the second degree, conspiracy or attempt to commit murder, or any other crime in connection with the death of Wah Choon Lee on August 3, 1937, [538] at Wahiawa.

Mr. Young: Let the record show, your Honor, my objection to this question. It is not relevant; it is not material to the issues in this case; it is an attempt to prejudice this jury and for the reason that it is not competent evidence in this matter; it would have no bearing upon this case one way or the other.

The Court: The Court sustains the objection and rejects the offer of proof.

Mr. Dwight: I make an offer to prove by this witness that the records of this Court disclose that no criminal charge of any nature, either murder in the second degree or conspiracy, or any other crime, has been lodged against the witness John Kiehm. My both offers are for the purpose of giving the jury facts pertaining to the question of their credibility, first, upon the question of whether or not any immunity has been offered to the witnesses, this fact being relevant to that issue, and further upon the ground that the evidence does tend to show and throw light upon the issue of whether or not these two witnesses were accomplices.

Mr. Young: May my same objection go to this, with the additional reason that on the matter of

(Testimony of Harry A. Wilder.)
the credibility of witnesses, counsel's own offer of proof is that there was no indictment placed at the present time, and could not possibly affect their credibility at this time and it is improper at this time to offer for that reason? [539] The principal reason is it is irrelevant and it is an attempt to prejudice the jury.

The Court: The Court will reject the offer of proof.

Mr. Dwight: And I offer to prove by the witness O'Connor that he is the District Magistrate of Wahiawa and was the District Magistrate since August last year and as such District Magistrate has complete control and custody of all criminal charges filed in the District Court of Wahiawa, and that the records of his Court and from his personal knowledge show that no complaint or charge was lodged by the police against Miss Penland——

The Court: Against who?

Mr. Dwight: (Continuing) against Miss Penland for the crime of either that of being a common prostitute or that of maintaining a house of ill fame, or any other crime in connection with any incident that occurred on August 3rd and 4th of 1937——

Mr. Young: May the record show, your Honor—

Mr. Dwight: (Continuing) and I state that that is vital to this case to determine the question

(Testimony of Harry A. Wilder.)

of whether or not Mr. Burns actually made a legal arrest.

Mr. Young: May the record show, your Honor, the Territory objects to this offer of proof for the reason that the offer of proof is irrelevant and immaterial; it is not within the issues of [540] this case; it is an attempt to bring before this jury a matter which will prejudice the jury, to-wit, that since Billie Penland has not been charged, therefore this defendant is not at fault in the case at bar.

The Court: I would like to take this up in chambers. Court will take a short recess. The jury can remain.

(A brief recess was taken.)

The Court: As part of the record, the Court in reconsidering these offers of proof, will set aside those rulings on the offers and overrule the objection in each case.

By Mr. Dwight:

Q. Mr. Wilder, will you refer to the docket of the Circuit Court and tell me if any charge of murder, conspiracy to murder, assault and battery or any other crime has been filed in this Court against Lou Rodgers in connection with the murder of Wah Choon Lee?

A. (Referring to the docket) I have examined this criminal docket from August 3, 1937, to date and I do not find the name of Lou Rodgers in the

(Testimony of Harry A. Wilder.)
docket as a party defendant in any action.

The Court In fairness to Mr. Young, the Territory's objection goes to this?

Mr. Young: Yes, and motion to strike.

By Mr. Dwight

Q. Mr. Wilder, have you examined the records of this Court from August 3rd up to the present time to determine whether or not a charge of murder or conspiracy to murder [541] or attempt to murder or any other criminal charge has been filed in this Court against John Kiehm in connection with the death of Wah Choon Lee?

Mr. Young: May the record show the same objection?

The Court: Yes, the record will show that.

A. How do you spell that name?

By Mr. Dwight:

Q. K-i-e-h-m, Kiehm.

A. (The witness examined the docket.) That name does not appear as party defendant in any case.

Q. Will you examine the docket to determine if any information or charge has been lodged in this Court against Doris Penland, Billie Penland——

A. Doris Billie Penland?

The Court: Florence.

By Mr. Dwight:

Q. (Continuing) Florence Billie Penland for being a common prostitute or for living in or about

(Testimony of Harry A. Wilder.)
a house of ill fame, in connection with an incident occurring on the 3rd or 4th of August, 1937?

A. (The witness examined the docket.) That name does not appear as a defendant in any case.

Mr. Dwight: Your witness.

Mr. Young: No questions.

Mr. Dwight: Judge O'Connor telephoned he is on his way here. He is outside, I think.

The Clerk (Mr. Wilder): Judge O'Connor is not here.

The Bailiff: He is not here yet. [542]

(Testimony by Stipulation of

EDWARD A. O'CONNOR,

subpoenaed as a witness on behalf of the defendant.)

Mr. Dwight: Will you stipulate as to Judge O'Connor? I would rather have him testify. May it please the Court, Judge O'Connor is under subpoena. I appreciate the fact that he is busy and he phoned me. (Mr. Dwight conferred with Mr. Young.) Counsel is willing to stipulate that if Judge O'Connor is called as a witness for the defendant, subject, however, to counsel's objection and exception, that he, Judge O'Connor, will testify that he is the District Magistrate of Wahiawa and as such is in charge of all of the records of the Court; that no criminal charge has been filed in his Court against Florence Billie Penland for be-

ing a common prostitute or for living in and about a house of ill fame or any other crime in connection with the incidents occurring on August 3rd and 4th, 1937, at the home of the defendant, Ilene Warren, on Muliwai Street in Wahiawa.

Mr. Young: We will stipulate if Judge O'Connor was called, he will so testify, but we will reserve our objection that if he were called, he would so testify.

The Court: Let that stipulation be entered in the record that if Judge O'Connor were called, he would so testify, subject to the objection of the Territory.

Mr. Dwight: At this time the defendant rests.

The defendant rested. [543]

Mr. Young: No rebuttal. The Territory rests.

The Territory rested in rebuttal.

Mr. Dwight: We are ready to take up the instructions.

The Court: The matter of instructions will be settled. The jury will be excused until nine o'clock tomorrow morning.

Mr. Dwight: I think, your Honor, may the jury be specially cautioned?

The Court: The prosecution and the defense have both rested, gentlemen of the jury, and you

are especially cautioned by the Court at this time, pending the final determination of this case by you, not to discuss the evidence in this case with anyone, any outsider, and not to read any newspaper account and to diligently report any attempt of anyone to reach you, to talk to you or discuss the matter with you in any way, and all the other general instructions I have given you in the past apply now. The jury will be excused until tomorrow morning at nine o'clock. You are excused. Court will stand adjourned.

(A recess was taken until Wednesday, February 16, 1938, at nine o'clock a. m.) [544]

Honolulu, T. H., February 16, 1938.

(The trial was resumed at 11:00 o'clock a. m.)

The Clerk: Criminal 14,332 Territory of Hawaii against Ilene Warren, alias "Speed" Warren.

Mr. Young: Ready for the Territory. Stipulate the defendant and the jury are present.

Mr. Dwight: Ready for the defendant and so stipulated.

The Court: So stipulated. Let the record so show. The Court and counsel for Territory and the defendant are still in the process of settling instructions. The Court will excuse the jury until nine o'clock tomorrow morning and the Court adjourns, as far as the jury is concerned, until that time and will proceed with the arguments at nine o'clock tomorrow morning. The Court will proceed to settle

the instructions in chambers. The Court stands adjourned until nine o'clock. The jury is under the same instructions as before.

(A recess was taken until Thursday, February 17, 1938, at nine o'clock a. m.) [545]

Honolulu, T. H., February 17, 1938.

(The trial was resumed at 9:00 o'clock a. m.)

The Clerk: Criminal 14,332 Territory of Hawaii vs. Ilene Warren alias "Speed" Warren.

Mr. Dwight: Ready for the defendant.

Mr. Young: Ready for the Territory. Stipulate the defendant and the jury are present.

Mr. Dwight: So stipulated, your Honor.

The Court: Let the record so show.

CLOSING ADDRESSES TO THE JURY

(Mr. Young made a closing address to the jury on behalf of the plaintiff, in the course of which he said):

Gentlemen, I anticipate much will be said about the Territory's witnesses. They will be condemned because they have not led the right type of life. The defense will condemn and argue not to believe them, especially the two girls in this case. Look at the position the Territory is in this case. We have called before you every possible witness in this case, irrespective of their testimony. We have brought to you every person in that house. Why?

To lay before you gentlemen the truth in this case. We have tried to bring before you every bit of evidence legally admissible in this Court for the purpose of seeking the truth. To do that we have had to go, you might say, into the enemy camp. We have had to put upon the stand and ask you to believe witnesses, who, by their occupation, are naturally upon the other [546] side. Now, you are going to say, why did they testify? Why, if they are on the other side? Gentlemen, those witnesses were subpoenaed by order of this Court in case they wished to come, but by order of the Court, the same as you gentlemen, and for the further reason, irrespective of what they think on the question of prostitution, murder is another matter, and each one of those witnesses made a statement on their life. To think that they have withheld evidence in this case, to think they have——

Mr. Dwight: At this time I except to counsel's remarks, commenting upon witnesses that have taken the stand. It is highly improper and prejudicial. I ask the Court to instruct the jury to disregard those remarks.

The Court: Gentlemen of the jury, this is merely argument. It is not evidence. Do not regard any remarks in this argument as evidence. Proceed.

(Mr. Young continued closing address to the jury on behalf of the plaintiff.)

(Mr. Dwight made a closing address to the jury on behalf of the defendant.)

Mr. Dwight: Does the Court want to take a little breathing spell at this time?

The Court: Do you wish to finish before lunch?

Mr. Dwight: I will probably take another three-quarters of an hour. [547]

The Court: The Court will adjourn.

Mr. Dwight: I suggest the jury be taken to lunch.

The Court: Swear the bailiff, Mr. Moses Kaululaau.

(Mr. Kaululaau was sworn as bailiff.)

The Court: Shall we adjourn until one-thirty or two?

Mr. Dwight: One-thirty will be all right.

The Court: The Court will adjourn until one-thirty p. m. The jurors will be in the custody of Mr. Moses Kaululaau. Proceed to Merchants' Grill and return here at one-thirty p. m. Court stands adjourned until one-thirty p. m.

(A recess was taken until 1:30 o'clock p.m.)

Afternoon Session

Mr. Dwight: May I proceed? I am willing to stipulate the defendant and jury are present.

Mr. Young: We will so stipulate.

The Court: The record will so show. Proceed.

(Mr. Dwight continued and concluded closing address to the jury on behalf of the defendant at 2:11 o'clock p. m.)

(Mr. Young continued and concluded closing address to the jury on behalf of the plaintiff, in the course of which he said):

I could not throw it out of my mind, if I were a juror.

Mr. Dwight: I except to the remark of counsel. [548] He had no right to make it. I cite it as error and misconduct on the part of the Public Prosecutor. I ask the Court instruct the jury to disregard it.

The Court: The jury will be instructed to disregard the opinion of counsel as to the guilt or innocence of this defendant and not to consider it at all.

THE CHARGE TO THE JURY

(The Court, at 3:50 o'clock p. m., charged the jury as follows): (Reading)

Gentlemen of the Jury, I instruct you that the defendant in this case stands charged in the indictment with the crime of murder in the second degree.

You are the exclusive judges of the facts in this case and the credibility of the witnesses but the law you must take from the court as given you in these instructions to be the law notwithstanding any opinion you might have as to what the law is or should be.

Gentlemen of the Jury, you are instructed that the defendant in this case is charged with the crime of murder in the second degree, the issues that you must decide are as follows:

In the first count of the indictment it is charged that the defendant on August 3, 1938

(1) with force and arms

(2) unlawfully, feloniously, wilfully and of her malice aforethought

(3) and without authority and without justification and without extenuation by law

(4) did kill and murder Wah Choon Lee, a human being.

Before you can convict the defendant upon this count, [549] you must find and be satisfied from the evidence that each and every element set forth above has been proven to your satisfaction and beyond all reasonable doubt.

If the prosecution has failed to prove any one of the foregoing elements to your satisfaction and beyond all reasonable doubt, I instruct you to acquit the defendant on this count.

If the evidence is evenly balanced as to any one of the foregoing elements I also instruct you to acquit the defendant.

In the second count of the indictment it is charged that the defendant on August 3, 1938

(1) with force and arms

(2) unlawfully, feloniously, wilfully and of her malice aforethought

(3) and without authority and without justification and without extenuation by law

(4) while the hands and body of Wah Choon Lee

(5) were in contact with a certain metal plate

(6) did then and there cause the said metal plate to be charged with a deadly charge of electric current,

(7) and did electrocute and give certain mortal injuries to Wah Choon Lee

(8) from which electrocution and mortal injuries Wah Choon Lee died.

Before you can convict the defendant upon this count, you must find and be satisfied from the evidence that each and every element set forth above has been proven to your satisfaction and beyond all reasonable doubt.

If the prosecution has failed to prove any one of the foregoing elements to your satisfaction and beyond all reasonable doubt, I instruct you to acquit the defendant. [550]

If the evidence is evenly balanced as to any one of the foregoing elements, I also instruct you to acquit the defendant.

In the third count of the indictment it is charged that the defendant on August 3, 1937

(1) with force and arms

(2) unlawfully, feloniously, wilfully and of her malice aforethought

(3) and without authority and without justification and without extenuation by law

(4) did cause a certain metal plate to be charged with a deadly charge of electric current

(5) well knowing at the time that Wah Choon Lee was about to bring and would bring

his hands and body into contact with said metal plate,

(6) and thereafter while said plate was charged with electricity, Wah Choon Lee did bring his body and hands into contact with said metal plate

(7) by reason thereof Wah Choon Lee was electrocuted

(8) and did receive certain mortal injuries

(9) from which electrocution and mortal injuries Wah Choon Lee died.

Before you can convict the defendant upon this count, you must find and be satisfied from the evidence that each and every element set forth above has been proven to your satisfaction and beyond all reasonable doubt.

If the prosecution has failed to prove any one of the foregoing elements to your satisfaction and beyond all reasonable doubt, I instruct you to acquit the defendant.

If the evidence is evenly balanced as to any one of the foregoing elements, I also instruct you to acquit the defendant.

The indictment in this case is in no sense evidence [551] or proof that the defendant has committed the alleged crime, but is merely a formal allegation, required by law, alleging that the crime was committed in the form and manner therein set forth, and no juror should suffer himself to be influenced in any degree by the fact that this indictment has been returned against the defendant.

I further instruct you that the offense with which this defendant stands charged is defined in our statutes as follows:

> "Murder is the killing of any human being with malice aforethought, without authority, justification or extenuation by law, and is of two degrees, the first and second, which shall be found by the jury."
>
> "Murder committed with deliberate premeditated malice aforethought, or in the commission of or attempt to commit any crime punishable with death, or committed with extreme atrocity or cruelty, is murder in the first degree.
>
> Murder not appearing to be in the first degree is murder in the second degree."

And in this connection the Court instructs you that malice aforethought is a necessary element to the crime of murder in the second degree but that it is not necessary for the Territory to prove that such malice aforethought was deliberate and premeditated; nor is it necessary for the Territory to prove that the killing was committed with extreme atrocity or cruelty.

"Manslaughter" is defined in our statutes as follows:

> "Whoever kills a human being without malice aforethought, and without authority, justification or extenuation by law, is guilty of the offense of manslaughter." [552]

And in this connection I instruct you that in order to prove the crime of manslaughter it is not necessary for the prosecution to show any intent on the part of the defendant to kill or injure the deceased, nor is it necessary for the prosecution to show that the defendant had any feelings of malice, hatred or illwill against the deceased.

You are further instructed that under our law the difference between murder in the second degree and manslaughter is that murder in the second degree has in it the element of malice aforethought while manslaughter has not such element of malice aforethought.

You are instructed that our law provides that under an indictment for murder in the second degree a jury may return a verdict of manslaughter, as the facts proved may warrant.

I further instruct you that "Malice" is defined in our statutes as follows:

> "Malice in respect to the commission of any offense, except in cases where it is otherwise expressly provided or plainly intended, includes not only hatred, illwill and desire of revenge; but cruelty of disposition or temper; and also a motive or desire of gain or advantage to the offender or another; or of doing a wrong or injury to any person or persons, or to the public: It also includes the acting with a heedless, reckless disregard or gross negligence of the life or lives, the health or personal safety,

or legal rights or privileges of another or others, many or few, known or unknown; also the wilful violation of a legal duty or obligation, and wilful contravention of law."

I further instruct you that under the laws of the Territory of Hawaii under a charge of Murder in the Second Degree when the act of killing another is proved, [553] malice aforethought shall be presumed, and the burden shall rest upon the party who committed the killing to show that malice aforethought did not exist, or a legal justification or extenuation for malice aforethought.

You are instructed that malice aforethought means malice and nothing more. There is no legal distinction between malice and malice aforethought.

You are further instructed that it is not necessary for the prosecution to prove, in order to warrant a conviction for the crime charged, that the defendant at the time of the alleged crime had any direct malice towards the deceased, Wah Choon Lee, in person, but it is enough if the prosecution prove to you beyond a reasonable doubt that malice existed against anyone similarly situated with the deceased.

I further instruct you that our statutes provide that every one shall be presumed to intend the natural and plainly probable consequences of his acts.

You are instructed that experts are allowed to give their opinion in answer to hypothetical ques-

tions. Before you can accept the answer of an expert you must be satisfied that the questions contain facts proved in this case beyond all reasonable doubt. If the facts upon which the hypothetical questions are not true, then you must disregard the opinion of such experts.

Gentlemen of the Jury, testimony has been given by certain witnesses who in law are termed experts and in this connection I would suggest to you that while in proceedings such as the one being tried the law receives the evidence of experts in certain lines as to their opinion derived from [554] their knowledge of particular matters. The ultimate weight which is to be given to the expert testimony of witnesses is a question to be determined by the jury and there is no rule or law which requires you to surrender your own judgment to that of any person testifying as an expert witness; in other words, the testimony of an expert like that of any other witness is to be received by you and given such weight as you think it is properly entitled to but you are not bound or concluded by the testimony of any witness expert or other.

You are instructed that an accomplice is any person who aids or abets or conspires with another to commit a crime. Accomplices may be principals or accessories. Persons who take part in the commission of any offense or being present aid, incite, countenance or encourage others in the commission thereof shall be deemed principals. Any persons who not himself being present at the commission of

an offense, abets another in the commission thereof or procures, coun*cils,* incites, commands or hires others to commit the same with such other thereupon, in pursuance thereof, commits, is an accessory before the fact to the commission of such offense.

You are instructed that the testimony of accomplices are of an untrustworthy nature and you are cautioned that it is unsafe to base a verdict of conviction solely thereon, and before you can accept such testimony you must first find other corroborating evidence of some point essential to the issue testified to by said accomplices.

You are instructed that prostitutes are a class whose moral perceptions are inevitably a good deal dulled [555] by the character of the life they have led and their associations and their testimony is to be viewed in the light of their moral astigmatism as shown by their mode of life and you must carefully scrutinize the same and you must be satisfied that it is corroborated by other credible evidence upon some point essential to the issue testified to by said prostitute before you can give credence to the same.

The court further instructs you, gentlemen of the jury, that you are the exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts in this case. It is your exclusive right to determine from the appearance of the witnesses on the stand, their manner of testi-

fying, their apparent candor or frankness, or lack thereof, which witness or witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given the testimony of the witnesses you are authorized to consider their relationship to the parties, if any, their interest, if any, in the result of this case, their temper, feeling or bias, if any has been shown, their demeanor on the witness stand, their means and opportunity of information, and the probability or improbability of the story told by them.

If you find and believe from the evidence that any witness in this case has knowingly and wilfully sworn falsely to any material fact in this trial or that any witness has knowingly and wilfully exaggerated or suppressed any material fact or circumstance in this trial for the purpose of deceiving, misleading or imposing upon you, then you have a right to reject the entire testimony [556] of such witness except insofar as the same is corroborated by other credible evidence or believed by you to be true.

You are instructed that Section 5404 of the Revised Laws of Hawaii 1935 provides as follows:

> "Policemen, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reason-

able suspicion that they have committed or intend to commit an offense."

You are hereby instructed that the term "reasonable suspicion" as used in said statute is construed by the Court to mean probable cause.

You should consider this law together with all the evidence in the case in determining whether or not the deceased, Wah Choon Lee, was lawfully upon the premises of the defendant at the time in question.

You are instructed that a police officer in order to make a valid arrest must at, or before, the time of making an arrest declare that he is an officer of justice, if such be the case. If he have a warrant he should show it if required, or if he make the arrest without a warrant, in any of the cases in which it is authorized by law, he should give the party arrested clearly to understand for what cause he undertakes to make the arrest.

You are instructed that any arrest without a warrant is prima facie illegal.

You are instructed that whenever it is necessary to enter a house to arrest an offender, and entrance is refused, the officer or person making the arrest may force [557] an entrance by breaking doors. But before breaking any door, he shall first demand entrance in a loud voice, and state that he is the bearer of a warrant of arrest, or if it is a case in which arrest is lawful without a warrant he must

substantially state that information in an audible voice.

You are instructed that mere suspicion is not enough to constitute probable cause for an arrest in the case of either a felony or a misdemeanor.

You are instructed that the probable cause to believe that a crime has been committed must be based on facts and any information not based on personal observation and perceptions of the officer is not a fact but purely hearsay.

You are instructed that a mere preparation of the means of committing any offense, nothing being done in execution of the intent to commit the same, is not an attempt to commit the same, as for example merely procuring poison intended to be used for murder.

You are instructed that prostitution is not a crime in the Territory of Hawaii and you are further instructed that a common prostitute is a vagrant, that vagrancy is a status and that one act of sexual intercourse for money does not of itself make such a person a common prostitute.

You are instructed that the crime of being a vagrant because the defendant in such a case is a common prostitute and the crime of maintaining a common nuisance by reason of maintaining a house of prostitution are misdemeanors.

You are instructed that under our law it is unlawful for any person to keep a house for the purpose of [558] public prostitution.

Any part of the building appropriated to the purpose of prostitution is a house within the meaning of this law.

Section 6310 of the Revised Laws of Hawaii 1935 makes it unlawful to be a common prostitute.

And in this connection the court instructs you that you may consider these laws, together with all the evidence in the case, in determining whether or not the deceased, Wah Choon Lee, and the other police officers with him, in entering upon the premises of the defendant, acted under such circumstances as would justify a reasonable suspicion based upon probable cause that someone upon the premises of the defendant had committed or intended to commit an offense against the laws of the Territory of Hawaii.

If you find from the evidence that the deceased entered upon the premises of the defendant without a warrant of arrest or a search warrant and without the consent of the defendant and without authority of law, you are instructed that he was a trespasser.

You are instructed that one making an illegal arrest or making an arrest in an illegal manner is a trespasser.

You are instructed that if you believe from all the evidence and beyond a reasonable doubt that the deceased was acting as a police officer and that he went upon the premises of the defendant for the purpose of assisting another police officer, and that

the deceased in so doing acted under such circumstances as would justify [559] a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to commit an offense against the laws of the Territory of Hawaii, then you must find under such circumstances that the deceased, Wah Choon Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased as a trespasser.

You are instructed that if you find from the evidence that Wah Choon Lee was a trespasser or at the time that he came in contact with the door of the defendant's home, illegally attempting to enter the premises of the defendant and you further find that the defendant did install the electrical equipment and did turn the switch which caused an electric force to flow through the metal plate on the door, and you further find that the force used was reasonable or apparently reasonable, to a reasonably prudent man, in defense of her home, then you must acquit the defendant.

You are instructed that a person owes no duty to a trespasser except to refrain from wilful, wanton or reckless conduct likely to injure him.

You are instructed that a person in his own dwelling house may use such means as are necessary even to the taking of life, to prevent a forcible and unlawful entry into his home.

To justify a homicide as in defense of habitation the accused must use no greater force than is necessary or apparently necessary to a reasonably prudent man. The force used by him must be neither greater in degree [560] nor early or later in point of time than is necessary or apparently necessary.

You are instructed that if you believe from all the evidence and beyond a reasonable doubt that the deceased was acting as a police officer and that he went upon the premises of the defendant for the purpose of arresting and detaining for examination such persons as he might have found thereon, and that the deceased in so doing acted under such circumstances as would justify a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to cimmit an offense against the laws of the Territory of Hawaii, then you must find under such circumstances that the deceased, Wah Choon Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased as a trespasser.

And in this connection you are further instructed that the fact as to whether or not there was a "no trespassing" sign upon the premises at the time, would not alter the right of the deceased, Wah Choon Lee, or the other police officers with him, to be upon the premises in question.

A criminal prosecution begins with the presumption that the defendant, although accused, is inno-

cent, and that to overcome this legal presumption the evidence must be clear and convincing and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty. The presumption of innocence is evidence created by the law in favor of one accused, whereby his [561] innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. The benefit of this presumption attends the accused at every stage of the proceedings and stands as her sufficient protection unless and until it has been removed by evidence proving her guilt beyond a reasonable doubt.

If you can reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence, it is your duty to do so and in that case to find her not guilty, for every reasonable doubt is to be resolved in favor of a defendant, and it is not sufficient that the circumstances coincide with, account for and therefore render probable the guilt of the defendant. It must exclude to a moral certainty every other reasonable hypothesis.

Under the law no jury should convict a person charged with crime upon mere suspicion, however strong, or simply because there is a preponderance of all of the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before the defendant can be convicted of crime is not suspicion, not mere probabilities, but proof which excludes all reasonable doubt of her innocence.

You are further instructed that while the prosecution is required to prove the defendant guilty of the crime of murder in the second degree beyond a reasonable doubt, it is not necessary that such proof should be made by direct proof, but may be shown by facts and circumstances in the evidence.

I further instruct you that evidence is of two kinds, [562] direct and circumstantial. Direct evidence is where a witness testifies of his own personal knowledge of the main fact, or facts, to be proven. Circumstantial evidence is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected facts, which usually and reasonably follow according to the common experience of mankind. A crime may be proven by circumstantial evidence, as defined in these instructions, as well as by direct testimony of eye-witnesses. There is nothing in the nature of circumstantial evidence that renders it less reliable than direct evidence if it is of such a character as to exclude every reasonable hypothesis, other than that of the defendant's guilt.

I further instruct you that the burden of proof is upon the Territory and the law, independent of the evidence, presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proves him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will

entitle the defendant to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, but a doubt that you could give a reason for.

A reasonable doubt is not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon moral evidence is open to conjectural or imaginary [563] doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty and if you have such belief so formed, it is your duty to convict, and if you have not such belief so formed, it is your duty to acquit. You should take all the testimony and all the circumstances into account and act as you have or have not such abiding belief the fact is.

You are instructed that under the law a defendant is not compelled to testify in her own behalf and the fact that a defendant has not testified in her own behalf is not be considered by you in determining the question of her guilt or innocence.

Gentlemen of the Jury, in placing hereby before you the instructions given, you are further instructed to disregard the notations in ink at the bottom of the instructions.

I further instruct you that you may bring in, under the charge against the defendant in this case,

either of the following verdicts as the facts and circumstances in evidence under the law as given you in these instructions may warrant:

1. Guilty as charged, or
2. Guilty of manslaughter, or
3. Not guilty.

Mr. Dwight: May it please the Court, at this time may I except to the granting by the Court of all of the Prosecution's Requested Instructions upon my general objection?

The Court: You may.

Mr. Dwight: To the granting of Prosecution's Requested Instructions Nos. 3, 4, 5, 12, 12A, 13, 14 and 17 over objection, and the refusal of the Court to give [564] Defendant's Requested Instructions Numbered 1, 2, 3, 4, 8, 10, 13, 16, 18, 28, 30, 31, 32 and 37.

The Court: Exception will be noted. The objections are already in the record. Have you any?

Mr. Young: No, your Honor.

The Court: Mr. Moses W. Kaululaau, I will give you these verdicts, the three forms as read in my last instruction. Hand them to the jury. You, gentlemen of the jury, will retire to the jury-room. The bailiff will escort you. You will have with you the exhibits in evidence in this case and if you desire any contact with the Court or desire any phase of the testimony or part of the testimony to be reread to you at any time or you desire the instructions or any one of them to be read, you may so

notify the bailiff, who will notify the Court. You will appoint a foreman and proceed with your deliberations forthwith. The jury will now retire. The Court in the meantime will recess, awaiting the deliberation of the jury.

(The jury retired to the jury room to deliberate upon its verdict, the Court took a recess, and the jury afterward returned into Court at 6:32 o'clock p. m., and the following proceedings were had):

The Court: Have you gentlemen reached a verdict?

The Foreman (Juror O'Sullivan): No, your Honor.

The Court: The Court instructs the bailiff to take the jury to dinner in his custody at the Young Hotel. Return here and go immediately to the jury [565] room to further deliberate on this case within an hour and a half from six-thirty.

Mr. Dwight: May I suggest that the instructions include the fact that the jury do not deliberate during the dinner hour. They can use their time to relax and not deliberate. Come back and deliberate.

The Court: The Court advises you that you should not deliberate or argue about the case. Just relax, enjoy a good meal, come back and then deliberate in the jury-room. You will be excused now in the custody of the bailiff and return any time

you desire within an hour and a half from six-thirty. So ordered.

(At 6:35 o'clock p. m. a recess was taken, awaiting the verdict of the jury.)

(At 9:15 o'clock p. m. the jury returned to the court-room and jury box and the following proceedings were had):

The Court: I understand, gentlemen of the jury, you wish to make a request of the Court.

The Foreman: Yes, your Honor, we would like to hear the testimony of Officer Burns, direct and redirect, and the testimony of Captain Caminos.

The Court: Is that all?

The Foreman: And Sergeant Erpelding.

The Court: Have you any objection?

Mr. Dwight: No, your Honor. I think the jury is entitled to it.

The Court: The request will be granted. [566] Mr. Clark, Reporter, read the entire testimony, first of Officer Burns, direct and redirect, and then read the direct and redirect of Caminos and Sergeant Erpelding. Officer Burns first.

(The reporter read the direct examination of Edward J. Burns, as set forth on pages 200 to 234, both inclusive, of this transcript.)

[Printer's Note: Pages 238 to 274 of this printed record.]

The Court: I would suggest we give Mr. Clark a rest. He has been reading for about two hours. In about ten or fifteen minutes come back and we will finish reading the testimony.

(A brief recess was taken.)

The Foreman: On the balance of the testimony of Burns, we will pass it and then go on to Captain Caminos, just from the time they left Honolulu, if there was instructions given to Burns and whatever instructions were given to Burns at Wahiawa as to the entrance of the home.

The Court: Then, Mr. Clark, turn to Captain Caminos' testimony. Just read that testimony which deals with instructions by Captain Caminos to Burns at Honolulu and Wahiawa and the evidence concerning the entry on reaching their destination at Muliwai Street. Use your judgment in finding that.

(The reporter read from the testimony of witness Clarence C. Caminos, as follows):

"Direct Examination

By Mr. Young:

Q. What time did you get out there?

A. At Ilene Warren's place you mean?

Q. Yes. [567]

A. About five to nine.

Q. Where had you been just prior to that?

A. I was at the Wahiawa Police Station.

Q. Who was with you, if anyone?

A. Captain Kalauli, Officer Francis Apoliona, Officer Yuen, Officer Chun and the deceased, Wah Choon Lee. * * *

Q. Now, where were the other officers? What did they do, if you saw them, when the whistle blew?

A. My instructions was this——

Mr. Dwight: Never mind what your instructions were. Objected to as incompetent, irrelevant and immaterial and hearsay.

The Court: Objection sustained.

* * * * * * *

Cross Examination

By Mr. Dwight:

Q. Caminos, how did you happen to go out to Wahiawa with this large group of police officers?

A. I received complaints from the citizens out there.

Q. That is why you went out there?

A. Yes, sir.

Q. You recall testifying here on January 24th? A. Beg pardon?

Q. You recall testifying here on January 24th of this year? A. Yes, sir.

Q. Do you recall in answer to that question you stated that you were ordered out to make raid on "Speed" Warren?

A. I don't recall that.

Q. You don't recall. If the reporter refreshes your [568] memory——?

A. It might be.

Q. We will take it up in the recess. You deny that you told me that you were ordered out to Wahiawa to raid "Speed" Warren?

A. I wouldn't deny that.

Q. You wouldn't deny that?

A. I don't recall saying that.

Q. Well, what were you going out to Wahiawa for?

A. I was going out to Wahiawa to make a raid on the home of Ilene Warren.

Q. Exactly, and you were ordered out to make that raid? A. Yes, sir.

Q. By whom?

A. By the Chief of Police, William A. Gabrielson.

Q. And you knew at that time that "Speed" Warren had never been convicted of any offense?

A. I knew she was convicted of one.

Mr. Young: It is calling for the conclusion of this witness, your Honor.

The Court: It has already been asked and answered.

Mr. Young: I object anyway. I ask the answer be stricken and the jury instructed to disregard it.

Mr. Dwight: I have no objection to it being stricken, if counsel objects.

The Court: It will be stricken on the suggestion of both counsel and the jury asked to disregard the question and answer.

By Mr. Dwight:

Q. You went to Wahiawa? [569]

A. Yes, sir.

Q. Without any search warrant?

A. Yes, sir.

Q. You never had the people sign any affidavits to support a search warrant?

A. No, sir.

Q. And you went out there without a warrant of arrest? A. Yes, sir.

Q. Wasn't that matter discussed in the Police Station?

A. About the search warrant?

Q. Yes. A. No, sir.

Q. Weren't you told you had no right to go there without a search warrant or warrant of arrest? A. No, sir.

Q. It wasn't discussed in the conference?

A. No, sir.

Q. Do you know Judge O'Connor?

A. Yes, sir.

Q. You ever discuss this case with him?

A. No, sir.

Q. You say you saw Burns walk up the street and go to the door? A. Yes, sir.

Q. What did he do when he got to the door?

A. He stood at the door. If he did knock or press the bell, that I couldn't say.

Q. You saw him go to that door?

A. Yes, sir.

Q. You had your eye on him all the time?

[570]

A. Yes, sir.

Q. You saw him go. You don't know whether he pressed the bell or not?

A. Well, I couldn't say.

Q. Then he went in? A. Yes, sir.

Q. You watched him all the time?

A. Yes, sir.

Q. Mr. Burns did not walk in and walk back around the house?

A. Mr. Burns did not walk around the house. He walked up to the door, he walked back to the sidewalk, then walked back.

Q. Did you talk your testimony over with Mr. Burns?

A. No, sir, I did not.

Q. Was Mr. Burns' testimony of January 24th discussed with you in any way, Mr. Caminos? A. No, sir.

Q. You are sure of that?

A. I am sure of that.

Q. Now, after you heard this whistle—Was it one whistle that you were to hear or what?

A. Well, my instructions was this,—when an arrest was made to blow his whistle. I heard the whistle once.

Q. You sent Mr. Burns in there to try and make a case of prostitution or fornication, to try to make one of the women?

A. Yes, sir.

Q. To try to make one of the women and if he made the woman, to blow his whistle? [571]

A. Yes, sir.

Q. That is exactly what you told him?

A. Yes, sir.

Q. When he blew the whistle you thought Burns had had intercourse with the woman?

A. No.

Q. Answer that question yes or no.

A. No.

Q. What did you think when the whistle blew?

A. When the whistle blew, I had in mind an arrest had been made; for what offense, I couldn't say.

Q. You remember telling me on January 24th that you went in there because you thought the act of prostitution had been committed?

A. No, sir.

Q. Now, isn't that a fact, you thought he had committed intercourse with some girl and had given the girl marked money, had fixed it?

A. No, sir.

Q. Did you give him instructions to have intercourse with one of the women?

A. I didn't instruct him to have intercourse with the woman in that home.

Q. You just told him to go in and give her three marked dollars? A. Yes, sir.

Q. That is all you told him to do?

A. Yes, sir.

Q. When he blew the whistle you knew that Burns had gone in and given this woman three marked dollars? [572]

A. At that time I did not think that Burns had gone in. I thought that Burns had given someone else the money to go in and when this person had gone in an arrest had been made.

Q. Now, you marched up with all the police officers? A. Yes, sir.

Q. You sent Burns ahead to go in?

A. Yes, sir.

Q. You told Burns, according to your testimony, that Burns was to go in and give this woman three dollars; when he gave her three marked dollars and had intercourse with her to blow the whistle?

A. My instructions was when Burns got in to see that she got the money, but Burns was instructed not to have intercourse with any of the women in the place.

Q. He was instructed not to have intercourse with anybody? A. Yes.

Q. Now, I get it: First, Burns was instructed to go in there and not have intercourse with anyone? A. Yes, sir.

Q. Then when he got in to see that somebody got three marked dollars?

A. Yes, sir.

Q. After somebody got three marked dollars, blow the whistle, that was his instructions?

A. His instructions was this, when he made an arrest in the place for him to blow his whistle

if he wanted assistance. That is the way he was instructed.

Q. Oh, I see. In other words, he wasn't even ordered [573] to make an arrest?

A. He was ordered to make an arrest. I instructed him that when he made the arrest in the place and if he wanted assistance, to blow his whistle.

Q. Let us go back. Let us get your instructions.

Mr. Young: Why, the witness can't answer his questions completely.

By Mr. Dwight:

Q. Have you anything more in answer to that question?

A. No, I have nothing further.

Q. You have answered the question?

A. Yes.

Q. So when Burns went in there he understood your instructions? A. Yes, sir.

Q. Did he say so? A. Yes, sir.

Q. In other words, he wasn't to have intercourse with anyone? A. Yes, sir.

Q. But he was to give somebody three marked dollars? A. Yes, sir.

Q. Then he was to arrest somebody and then blow the whistle? A. Yes, sir.

Q. And then when the whistle blew, it was to be blown only if he needed assistance?

A. No, sir, if an arrest was made.

Q. If an arrest was made. In other words, when he made the arrest he blew the whistle?

[574]

A. When he made the arrest, he blew the whistle.

Q. It wasn't so much for assistance?

A. I would say for assistance.

Q. You remember testifying just two weeks ago, Mr. Caminos, about that?

Mr. Young: I object to counsel arguing with this witness that he switched his testimony.

Mr. Dwight: I withdraw that.

Q. Do you recall, Mr. Caminos, testifying that you instructed Burns to go in and make a case of prostitution? A. I did not.

Q. And when he made a case to blow the whistle?

A. I did not tell him to go in there and make a case. I told him that in case he got into the home and if he felt that an arrest should be made for some kind of violation to place the people under arrest and to notify us, the other officers, by a blast of his police whistle.

Q. Did you tell him to take off his clothes?

A. I did not.

Q. Did you tell him to remain naked until you could get in? A. I did not.

Q. Did he make any statement to you when he came to the front door and was naked?

A. When he came to the door leading into the sitting room I noticed that he had his un-

dershirt on. I asked him where were the women that he had placed under arrest. He told me that they had got away from him and they tried to beat him up.

Q. Now, when you say the door opened "Speed" Warren was standing there? [575]

A. Yes, sir.

Q. You recall my asking you that question, who opened the door? That was only two weeks ago.

A. Yes, I remember you asking me that question.

Q. What was your answer?

A. I couldn't say who opened the door.

Q. Are you sure? A. I am sure.

Q. Did you say "Speed" Warren opened the door? A. I did not.

Q. You deny making that statement?

A. I deny making that statement.

Q. You never talked to Young about this phase of your testimony since January 24th?

A. The Prosecutor?

Q. Yes. A. I did.

Q. Mr. Young called your attention to the fact, did he not, that Mr. Burns had testified he opened the door?

A. I don't recall that.

Q. You don't recall that. Did he call your attention to the fact that you had testified Mrs. Warren opened the door?

A. Mr. Young didn't tell me that.

Q. He didn't tell you that?

A. No."

* * * * * * *

The Court: Is that sufficient of his evidence?

The Foreman (Juror O'Sullivan): Yes. We want the portion of the testimony of Sergeant Erpelding when he was in the room. [576]

(The reporter read from the testimony of witness Charles W. Erpelding, as follows):

"Direct Examination

By Mr. Young:

Q. You went in the house then?

A. That is right.

Q. Where did you go in the house?

A. I went in the back room downstairs.

Q. Now, while you were sitting in the parlor did you hear anything unusual after you came back from the room?

A. Yes, I heard a whistle blow and somebody started banging on the outside and said, "Open up, police."

Q. You heard all that inside?

A. That is right.

Q. Now, was there any other man in there at that time when you heard the whistle?

A. Yes. I didn't know; after the whistle blew, there was another man.

Q. Did you see a man in the parlor after the whistle blew? A. Yes, a soldier.

Q. Was he in uniform?

A. He was in uniform.

Q. Where was this girl that you first saw?

A. I don't know.

Q. You don't know? A. No.

Q. After the whistle blew what happened, if anything?

A. Why, I heard the banging on the outside. Some girl and man come running out of a room there.

Q. And you saw a man and a girl come out of a room? A. That is right.

Q. What room did they come out of? [577]

A. A room on my left, which one I don't know.

Q. And which way did they go?

A. They went towards the front entrance.

Q. They went towards the front entrance of the house? A. That is right.

Q. And were they together or were they apart?

A. One of them was ahead of the other, two or three feet apart.

Q. Two or three feet apart. Who was ahead, the girl or the man? A. The girl.

Q. And the man was behind her?

A. Yes.

Q. Did you see where they went?

A. They went in the front entrance and after that I couldn't see.

Q. You didn't see anything after they went into the front entrance? A. No.

Q. What did you do after that?

A. I sat right there.

Q. How were these two people dressed?

A. They wasn't dressed.

Q. They weren't? You say you sat right there? A. That is right.

Q. How about the soldier in uniform?

A. He sat right there, too.

Q. He sat right there, too. How long did you sit there?

A. Until the cops came and took us away. [578]

Q. Was the other man, the soldier in uniform, there when the cops came?

A. Yes; I started to go towards the front door on the inside of the sitting room. He stopped me and said, "I am a police officer." He stopped me. I went back and sat down.

Q. From the time that the whistle blew and when the police came, had you moved at all?

A. No.

Q. Had the other soldier got up, too?

A. Not to my knowledge, he did not.

Q. Do you know that other soldier?

A. No."

* * * * * * *

The Court: Anything further?

The Foreman (Juror O'Sullivan): That is all.

The Court: You gentlemen retire and deliberate further upon your verdict.

(The jury again retired, and afterward returned into the court-room and jury box, whereupon the following proceedings were had, at 12:20 o'clock a. m.):

The Court: Gentlemen of the jury, have you reached a verdict?

The Foreman (Juror O'Sullivan): No, your Honor.

The Court: Do you believe that there is any possibility that you could reach a verdict in the next hour?

The Foreman: I don't think so.

The Court: Well, if you have a nice rest, do you believe that it would be possible? [579]

The Foreman: We might.

The Court: The Court believes if you do have a nice rest, sleep on it, your minds will be clear, you will be rested, there would be that possibility. The Court agrees with you. You will retire with the bailiff to the Young Hotel tonight. Report back for deliberations tomorrow morning at nine o'clock. Take breakfast at the hotel. Bring them back after breakfast.

Mr. Dwight: May I suggest the jury be instructed not to deliberate at all between now and when they return to the court-room?

The Court: That is a good suggestion. You are instructed not to deliberate any more tonight or in the morning at the hotel until you come back here tomorrow morning in the jury room, just to give your mind a complete rest. Retire to the Young Hotel, have breakfast and return tomorrow morning. That is all. The Court will adjourn.

(The jury retired at 12:25 o'clock a. m. in the custody of Bailiff Moses W. Kaululaau to the Young Hotel; a recess was taken until Friday, February 18, 1938, to await the verdict of the jury.) [580]

Honolulu, T. H., February 18, 1938.

(The trial was resumed and the jury returned to the jury room in the custody of the bailiff for further deliberation upon their verdict.

At 10:45 o'clock a. m., the bailiff reported to the Court the jury had a request to make. Both counsel being present in chambers and the clerk of court, the following proceedings were had):

The Court: This is a request from the jury in the Warren case through the bailiff that they be permitted to see and have in the jury room the exhibits in this case. There is no objection.

Mr. Dwight: Particularly the pictures of the defendant's home.

The Court: The pictures of the defendant's home. There being no objection, the Court allows that request and also all the exhibits.

Mr. Dwight: That is all they want.

The Court: All right. Those exhibits will be sent up to the jury room for the edification of the jury.

(The exhibits were delivered to the jury by the bailiff.)

(At 12:10 o'clock p. m., the jury returned to the court-room and jury box. Thereupon the following proceedings were had):

The Clerk: Criminal 14332 Territory of Hawaii against Ilene Warren, alias "Speed" Warren.

The Court: Gentlemen of the Jury, have you reached a verdict? [581]

The Foreman: No, your Honor.

The Court: Well, the jury will go to lunch with the bailiff. You expressed a preference for the Young Hotel. Be back any time within an hour and a half or sooner; any time the jury desires to come back.

(At 12:15 o'clock p. m. the jury retired from the court-room in the custody of Bailiff Moses W. Kaululaau for luncheon at the Young Hotel and afterward returned to the jury room for further deliberation upon their verdict.

At 4:45 o'clock p. m., the bailiff reported to the Court the jury had a request to make. Both counsel being present in chambers, the clerk of court (Mrs. Sezenevsky) and the bailiff, the following proceedings were had):

The Court: Moke, for the record: You, Moke, the bailiff, you brought down Instruction No. 20, page 24, with a request, I understand, from the jury. What was that request?

("Instruction No. 20—Defendant

"You are instructed that a mere preparation of the means of committing any offense, nothing being done in execution of the intent to commit the same, is not an attempt to commit the same, as for example merely procuring poison intended to be used for murder."

24")

The Bailiff: The request was they want you to explain it, what it really means, what way the Court should explain.

The Court: What that instruction means?

The Bailiff: Yes.

Mr. Dwight: That is all? [582]

The Bailiff: Yes.

Mr. Dwight: I object at this time to this Court at this time instructing the jury or offering an instruction to the jury on any other subject than that covered by the request, the request being that the Court explain "preparation"; that the approved instruction contains an instruction upon the law of attempt; which denies to the defendant the opportunity of arguing the instruction before the jury, the case having been submitted to the jury and the jury having deliberated upon their verdict and not having

requested any instruction upon "attempts." I also object to the proposed instruction upon the ground that it is misleading; that it does not elaborate upon Instruction No. 20; upon the further ground that it does not state the law of "preparation" as defined by our statute and further except to the giving of the instruction as prejudicial and as denying this defendant a fair trial under the Sixth Amendment of the Constitution of the United States. Now, that is all my formal objection.

Mr. Young: May I make a statement for the purpose of the record?

The Court: Mr. Young.

Mr. Young: If your Honor please, as I understand the request from the jury, the instruction they have requested to be explained contains the matter of "preparation". "Preparation" is no crime in the Territory of Hawaii. It must be read in connection with an "attempt". I have read the [583] instruction which the Court is going to offer and in my opinion this is a proper instruction, setting forth the law of "attempts" and that it is necessary in order for the jury to understand the procuring part of an attempt in preparation. The jury do not understand what an "attempt" is. It is very difficult, if not impossible, for them to understand what the preparation for an attempt is. Now, the Territory feels at this time that the instruction of "preparation" was erroneously given to the jury.

Mr. Dwight: May I except to this at this time? This is the law of the case. I submit counsel has no right to use that as the basis of any argument for the offering of this instruction.

Mr. Young: I am just stating my reason. You can take your exceptions later. The Territory feels that the giving of the instruction on "preparation" was not warranted as not being within the issues of this case; that at this time the Territory feels that there should be no further explanation of such an instruction because it was not proper to give it to them in the first place, but if the Court desires to give them a further instruction, the Territory feels that it is the proper instruction to be given.

Mr. Dwight: May I except to the Prosecutor's remarks as contemptuous, as improper, as illegal, as being offered solely for the purpose of prejudicing the Court in the consideration of this instruction before proper argument has been made thereon by counsel for the defendant—— [584]

Mr. Young: May the record show——

Mr. Dwight: Just a moment. (Continuing) and I assign counsel's remarks as error and as misconduct on the part of the Public Prosecutor and I ask that a mistrial at this time be entered before we argue.

Mr. Young: May the record show that my statement to your Honor was made in all good faith, with all due respect to this Honorable Court? The Territory was merely trying to explain its position

in the matter of the instruction that is to go to the jury at this time.

Mr. Dwight: I submit we can send for the bailiff. I want to point out further my objection so that the record will be clear, that is, the formal grounds of the objection. (Reading) "In answer to that request," that is, the request on "preparation", (Reading) "you are further instructed that if a person had the intent to commit a crime with another person and had done everything required and necessary for the preparation for the actual commission thereof", I submit that that language is not definite enough for this reason, that we are dealing with the crime of sexual intercourse. We are dealing with the crime of living in and about a house of ill-fame. There are the two crimes, the evidence discloses, may or may not have been committed by Miss Penland under the evidence. The expression "had done everything required" may mean everything, including the act of sexual intercourse, and then the expression "and was ready, willing and [585] able to commit that crime" therefore makes the instruction misleading; in other words, the person had done everything required to commit the crime means the commission of the crime; that is what it means in so many words, "and was ready, willing and able to commit that crime". Our statute specifically says if a crime has been committed, "attempt" is merged into the commission of the crime. I also object to the next clause.

The Court: I have a modification on your objection to read in connection with your objection, "had done everything required and necessary for the actual commission thereof". I have modified it, "had done everything required and necessary for the preparation for the actual commission thereof."

Mr. Young: Put in the word "preparation".

The Court: "For the preparation". Have you any other objection?

Mr. Dwight: Yes, the next one, (Reading) "then he is guilty of an attempt to commit that crime". Now, this is the furious part of this instruction, "regardless of whether or not the person with whom he intended to commit the crime had an intent to also commit the crime," as being a violation of the case of Territory v. Hondo, which is cited in the case of Territory v. Bodine, and I want to refer to the case of Territory v. Bodine in a little while; and the next clause (Reading) "The mere fact that the other person withdrew and thereby prevented the commission of the crime does not preclude and prevent the crime [586] of attempt," as misleading, as misstating the law, as not an instruction upon the law—I mean an instruction of law upon the facts as shown in this case. The facts in this case conclusively show without any dissent and by witnesses for the prosecution, which testimony binds the government, that there was no intention whatsoever to commit the crime of sexual intercourse and further that there was no withdrawal and further that the evidence conclusively shows in

this case, without any evidence contradicting it, that there was no withdrawal so as to prevent the culmination of the commission of the crime and for that reason that portion of the instruction is not within the issues of the case. I further object to the illustrations contained in the second paragraph, first, that a man may make an attempt, an effort, a trial to steal by breaking open a trunk and be disappointed in not finding the object of pursuit and so not steal in fact, as being an example of an "attempt" and not an example of "preparation", as requested by the jury in this case. Upon the further ground that the defendant has been deprived of his opportunity to argue to the jury upon the example of "attempt" set forth in this paragraph. (Argument.) In view of the objection of both counsel, I think that is sufficient ground to send this back.

The Court: I am going to send this back with this statement, to consider that and all the other instructions of this Court. [587]

(A brief recess was taken. At 4:45 o'clock p. m., both counsel, as well as Mr. William Z. Fairbanks, Assistant Public Prosecutor, being present in chambers, the clerk of court and the bailiff, the following proceedings were had):

Mr. Young: I want the record to show that after reading the authorities, the Territory believes it is now the proper procedure for the Court to give an instruction along the line proposed.

Mr. Dwight: I want an opportunity to look up the law. Counsel rushed in one moment ago. It is unconstitutional; it deprives the defendant of a fair trial by jury. I submit the Court can't give this instruction to the jury.

The Court: The Court will give this instruction.

Mr. Dwight: May I suggest that the bailiff ask the jurors if they want further instruction on that; that you send back the instruction. They have not asked for further instruction on it.

The Court: The Court takes that suggestion and tells the bailiff to ask them if they want more instruction in reference to Instruction No. 20 on page 24. If they do, give that instruction to them. If they do, I will give it in open Court.

(The Court handed Instruction No. 20 to the bailiff and the bailiff complied with the order of the Court.)

Mr. Fairbanks: Then that will save the record.

Mr. Dwight: I forgot that Mr. Fairbanks was [588] a Deputy Public Prosecutor, as well as an officer of the Court. I want the record to show that.

(The bailiff returned to the Court in chambers and reported as follows):

The Bailiff: They want to come down and let the Court instruct them.

(A brief recess was taken. At 5:53 o'clock p. m., the jury returned to the court-room and

jury box, and the following proceedings were had):

The Court: Gentlemen of the jury, I understand you have made a request of the Court. What is it, on this Instruction No. 20 on page 24, on the bottom of page 24?

The Foreman: Yes, Your Honor. We would like to get some explanation on it.

The Court: You wish further instruction on that?

The Foreman: Yes.

Mr. Dwight: If the Court please, will the Court inquire of the Foreman of the jury whether they want an explanation of that particular instruction?

The Court: Just what do you want?

The Foreman: Just this phrase here, Your Honor, (Reading) "nothing being done in execution of the intent to commit the same."

(The reporter read the foregoing statement of the foreman of the jury.)

Mr. Dwight: I take it, your Honor, what the jury desires is an instruction on the last clause, the words "nothing being done in execution of the intent to commit the same." [589]

The Court: The Court is ready to instruct the jury.

Mr. Dwight: May I suggest, in view of the request of the jury, at this time the jury be permitted to take their dinner and counsel to take up the

matter during the dinner hour, the request being concerning that last clause.

Mr. Young: Your Honor, if I may make a suggestion, I believe the instruction which Your Honor has prepared is applicable to the request of the jury.

The Court: Do I understand, Mr. Foreman, that that is the only part of that instruction that you wish an illustration on?

The Foreman: Yes, sir.

The Court: You understand all the other part except that.

The Foreman: Just that one part; yes, sir.

The Court: The Court will take this request of just one phrase out of the instructions under advisement to instruct the jury just on those words, "nothing being done in execution of the intent to commit the same". The Court is ready to instruct at this time, that being the subject matter, explaining the phrase, "nothing being done in execution of the intent to commit the same." It is a phrase modifying the phrase "a mere preparation of the means of committing any offense", which is the subject matter of the sentence. The Court is ready to instruct the jury. (Reading)

Gentlemen of the Jury: You have requested this [590] Court for further instructions in respect to my instruction already given numbered Instruction No. 20, on page 24.

In answer to that request you are further instructed that if a person had the intent to commit

a crime with another person and had done everything required and necessary for the preparation for the actual commission thereof and was ready, willing and able to commit that crime, then he is guilty of an attempt to commit that crime, regardless of whether or not the person with whom he intended to commit the crime had an intent to also commit the crime. The mere fact that the other person withdrew and thereby prevented the commission of the crime does not preclude and prevent the crime of attempt.

In this connection I instruct you that Section 5310 R. L. of Hawaii, 1935 provides as follows:

> "Attempt. An attempt to commit an offense is some act done towards committing and in part execution of the intent to commit the same. As for example, putting poison in the way of a person, with intent thereby to murder him."

This instruction will be handed to the jury as part of the instructions of the Court as Instruction No. 44.

Mr. Dwight: May it please the Court, may the defendant except to the giving of the instruction upon the ground that the instruction given by the Court is not in response to any request made by the jury, in that the jury did request an explanation of the words mentioned by the Foreman of the jury; upon the ground that the instruction does contain facts upon which this defendant has no op-

portunity to argue to the jury and therefore denies the de- [591] fendant the opportunity of a fair trial by jury under the Sixth Amendment; upon the further ground that the instruction does not state the law of preparation as set forth in the instruction granted by this Court to the jury in Instruction No. 20. May my exception be noted, your Honor?

The Court: It may be noted.

Mr. Dwight: May the jury be excused at this time so that I may go home?

The Court: The jury will be excused for the purpose of lunch, recreation and rest, I believe, three hours. The Court is going to give you—Have you any request?

The Foreman: There is a request by the jury to go upstairs for another ten or fifteen minutes.

The Court: Proceed up to the jury room for another ten or fifteen minutes.

(The jury retired at 6:02 o'clock p. m., and afterward returned into court, whereupon the following proceedings were had:)

THE VERDICT

The Court: Gentlemen of the Jury, have you reached a verdict?

The Foreman: Yes, Your Honor.

The Court: Hand it to the Clerk.

(The Foreman handed the verdict to the Clerk (Mr. Wilder), which was read by him, as follows:)

"In the Circuit Court of the First Circuit
Territory of Hawaii

January Term, A. D. 1938 [592]

Honorable Louis LeBaron, First Judge,
Presiding:

Criminal No. 14332

THE TERRITORY OF HAWAII

v.

ILENE WARREN alias
"SPEED" WARREN,

Defendant.

VERDICT

We the Jury, in the above entitled cause, find the defendant Guilty of Manslaughter, Leniency Recommended.

(Signed) PATRICK JOHN O'SULLIVAN
Foreman.

February 18, 1938."

Mr. Dwight: At this time, may it please the Court, may I except upon the ground it is contrary to law, the evidence, the weight of the evidence, and hereby give notice of a motion for a new trial.

The Court: Let the record so show.

Mr. Dwight: The matter of sentence, does the Court wish to pass upon that?

The Court: I will poll the jury.

(The court asked each juror in turn whether the verdict finding the defendant guilty of manslaughter, leniency recommended, was his verdict, and each juror answered in the affirmative.)

The Court: The Court orders this verdict filed and finds and adjudges the defendant guilty of manslaughter.

Mr. Dwight: May I except to the verdict at this time——

The Court: You may except.

Mr. Dwight: (Continuing) and the judgment of the [593] Court.

Mr. Young: The matter of sentence, next Friday?

Mr. Dwight: One week from today?

Mr. Young: Yes, Your Honor.

The Court: The matter of sentence is continued for one week from today. The jury are excused. The Court adjourns.

(The Court adjourned at 6:20 o'clock p. m.) [594]

Honolulu, T. H., April 14, 1938.

(At 2:00 o'clock p. m., the defendant was brought before the Court for sentence. Both counsel being present, and the clerk of court, the following proceedings were had:)

TRANSCRIPT OF PROCEEDINGS AT IMPOSITION OF SENTENCE

The Clerk (Mr. Wilder): Criminal 14,332 Territory of Hawaii versus Ilene Warren alias

"Speed" Warren, for sentence.

The Court: This comes before the Court in the matter of sentence at this time. The jury having found the defendant guilty of manslaughter with the recommendation of leniency, and the Court having overruled the defendant's motion for a new trial, the Court is now ready to impose sentence. Ilene Warren, have you anything to say why sentence should not now be passed upon you?

The Defendant: No.

Mr. Dwight: May it please the Court, we are ready for sentence, but I would like to make a statement on behalf of the defendant.

The Court: Sure.

Mr. Dwight: May it please the Court, this was an unusual case. We submit to the verdict of the jury. The jury found her guilty of manslaughter with the recommendation of leniency. The Court instructed the jury on the law. The Court instructed the jury that she had the right to take life in the protection of her home. The jury, however, feel the means [595] she used was unreasonable, perhaps one of the reasons—nobody knows—and found her guilty of manslaughter and recommended leniency. I don't know what the expression "leniency" means, whether the Court will take that into consideration, but I do know the Court will take into consideration that, as a matter of law, she had a right to protect her home against any illegal entry. She had a right in the protection of her home to take life, if the means were reasonable. And also, may it please the Court, her

record, although the police did testify, there is absolutely no conviction against her. She has no former criminal record and I submit, may it please the Court, in view of her standing in the community, the fact that she is not a man, due to the fact she did what any other human being would have done, sought an electrician to install the apparatus, which apparatus was not a dangerous implement, due to the fact that five or six people had come into contact with the same, after all it would be for the public good that this Court suspend sentence and put her on probation.

The Court: Mr. Young, have you any recommendation, anything to say in that regard?

Mr. Young: Pardon me just a moment, Your Honor. (Mr. Young conferred with Mr. Charles E. Cassidy, Public Prosecutor.) If Your Honor please, after quite a lengthy trial I am quite sure that Your Honor is well acquainted with the facts in this case as presented by the prosecution. We do not feel that the facts in this case warrant placing [596] this defendant upon probation.

The Court: The Court will impose sentence. The jury recommended leniency in imposing sentence. The Court informs the defendant that the question of leniency will be taken up in reference to the minimum subsequently. Consequently, it is the sentence and judgment of this Court that you, Ilene Warren, be confined for the period of Ten Years at hard labor in Oahu Penitentiary, costs remitted. The Court states again that the minimum

sentence will be set later and subsequently according to law, at which time it will also consider the question of leniency with reference to the minimum sentence.

Mr. Dwight: May it please the Court, may the mittimus be stayed?

The Court: It may.

Mr. Dwight: May the defendant save an exception to the sentence on the ground it is contrary to law and also upon the same grounds set forth in the motion for a new trial, which are specifically made a part of the record and may mittimus be stayed until the suing out of a writ of error.

The Court: Mittimus stayed until the perfection of the appeal.

Mr. Young: If the Court please, may the mittimus be stayed for a definite period?

The Court: Thirty days; so ordered. Mittimus is stayed for thirty days. [597]

CERTIFICATE OF REPORTER

I Hereby Certify that the foregoing, consisting of Volume I, Part I, pages number 1 to 285, inclusive, and Volume I, Part II, pages number 286 to 598, inclusive, to be a full, true and correct transcript of my shorthand notes in the above-entitled matter.

Dated: Honolulu, T. H., May 27, 1938.

GEORGE R. CLARK

Official Shorthand Reporter
Circuit Court, 1st Circuit
Territory of Hawaii.

[Endorsed]: Filed Aug. 1, 1938. [598]

[Endorsed]: No. 9506. United States Circuit Court of Appeals for the Ninth Circuit. Ilene Warren alias Speed Warren, Appellant, vs. The Territory of Hawaii, Appellee. Transcript of Record. Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed April 24, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

Case No. 9506

ILENE WARREN, etc.,

vs.

TERRITORY OF HAWAII.

STATEMENT OF POINTS UPON WHICH DEFENDANT PLAINTIFF-IN-ERROR INTENDS TO RELY

Now comes Ilene Warren alias "Speed" Warren, Defendant, Plaintiff-in-Error, above named, and presents the following Statement of Points upon which she intends to rely on the appeal and the designation of the parts of the Record considered material for the disposition thereof.

I.

That the Supreme Court of the Territory of Hawaii erred in sustaining the rulings of the Circuit Court of the First Judicial Circuit over the objection and exception of Defendant, Plaintiff-in-Error:

(a) in admitting the testimony of Edward J. Burns, a witness for the Territory of Hawaii, concerning his observations in the home of the Defendant;

(b) the testimony of Lou Rodgers, a witness for the Territory of Hawaii, concerning the electrical equipment and the installation thereof in the home of the Defendant;

(c) the testimony of John Kiehm, a witness for the Territory of Hawaii, concerning the electrical apparatus in the home of the Defendant and the installation thereof; and

(d) the testimony of Florence Billie Penland, a witness for the Territory of Hawaii, to the effect that the Defendant told her she pulled the switch.

The said evidence being incompetent, irrelevant and immaterial in that it was procured and adduced in violation of the Defendant's rights under the Constitution of the United States and the Fourth and Fifth Amendments thereof.

The Defendant, Plaintiff-in-Error designates the testimony of the witness, Edward J. Burns, contained on pages 200 to 270 of the Transcript of the Evidence, the testimony of Lou Rogers appearing on pages 37 to 123 of the Transcript of the Evidence, the testimony of John Kiehm appearing on pages 123 to 154 of the Transcript of the Evidence as necessary for the consideration of the foregoing points.

II.

That the Supreme Court of the Territory of Hawaii erred in sustaining the rulings of the Circuit Court of the First Judicial Circuit in giving to the jury, over the objection and exception of Defendant, Territory's Requested Instructions Nos. 12, 12-A and 14 and in refusing to give Defendant's Requested Instructions Nos. 16 and 18, upon the grounds that said Instructions 12, 12-A and 14 were based upon Section 5405 of the Revised Laws of

Hawaii, 1935, which section is unconstitutional and void in that it controvenes Article Four of the Amendments to the Constitution of the United States, in that said statute and said instructions make no distinction between arrests in cases of misdemeanors and arrests in cases of felonies and that under said instruction the jury was instructed that an arrest may be made in the case of a misdemeanor in cases where the crime was committed without the presence of the arresting officer and therefore violative of the Defendant's rights under the Constitution of the United States.

That Instructions Nos. 16 and 18 were consistent with the Constitution of the United States and the Fourth Amendment thereof and that the refusal to give said Instructions was violative of the Defendant's rights under the Fourth Amendment to the Constitution of the United States.

The Defendant, Plaintiff-In-Error, designates Prosecution's Requested Instruction 12, appearing on page 88-89 of the Record, Prosecution's Requested Instruction 12-A, appearing on pages 90-91 of the Record and Prosecution's Requested Instruction No. 14, appearing on page 92 of the Record, Defendant's Requested Instruction No. 16, appearing on page 93 of the Record, Defendant's Requested Instruction No. 18, appearing on page 94 of the Record, the Court's charge to the jury, appearing on pages 549-564 of the Transcript of the Evidence, Record pages 589 to 607, and the Tran-

script of the Evidence taken at the trial, as necessary for the consideration thereof.

Dated at Honolulu, Hawaii, this 3 day of June A. D. 1940.

ILENE WARREN, alias
"SPEED" WARREN,
Defendant, Plaintiff-in-Error,
By CHARLES B. DWIGHT
Her Attorney.

Receipt of a copy of the within acknowledged this 4 day of June 1940.

KENNETH E. YOUNG,
Atty. For Ter. of Hawaii

[Endorsed]: Filed Jun 6 1940 Paul P. O'Brien, Clerk.

No. 9506

In The United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

3

ILENE WARREN alias "SPEED" WARREN,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

BRIEF OF APPELLEE

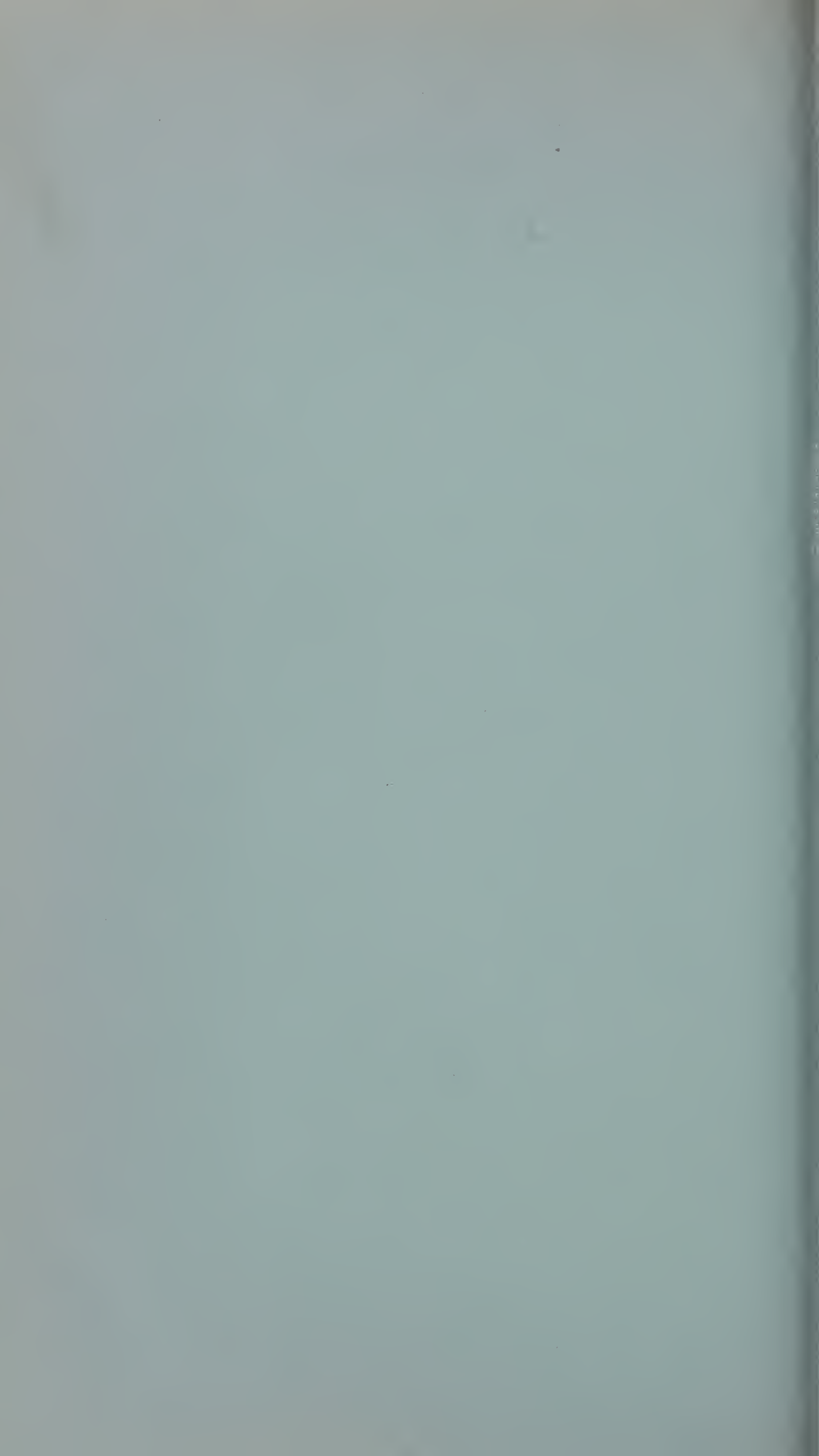
On APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

CHAS. E. CASSIDY and
KENNETH E. YOUNG,
Attorneys for Appellee.

Filed this .... day of October, 1940.
PAUL P. O'BRIEN, *Clerk,*

By..
Deputy Clerk.

FILED
OCT 10 1940
PAUL P. O'BRIEN



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No. 9506

In The United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

ILENE WARREN alias
"SPEED" WARREN,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

BRIEF OF APPELLEE

Statement Disclosing Absence of Jurisdiction

The record herein shows with regard to the perfecting of the appeal herein, that the original decision and judgment of the Supreme Court of the Territory of Hawaii in this cause was filed on October 20, 1939 (Record p. 668). The Appellant thereafter filed in the Supreme Court a petition for a rehearing (the petition does not appear in the record). On November 25, 1939, the Supreme Court dismissed the petition for a rehearing on the ground that the Court had no jurisdiction to entertain the petition (Record pp. 669–71). On February 20, 1940, application was made to a Justice of the

Supreme Court for an appeal from the judgment of the Supreme Court of the Territory of Hawaii, filed on October 20, 1939 (Rec. pp. 6–7).

JURISDICTIONAL POINT

Appeal Should Be Dismissed For Lack of Jurisdiction

The question of jurisdiction is one that can be raised at any time and an appeal may be dismissed, because of lack of jurisdiction, on the court's own motion.

Mansfield, C&L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. Ed. 462.
The Taigen Maru, 73 Fed. (2d) 922 (9th C.C.A.).

A

When an Appellate Court has no Jurisdiction to Entertain or Consider a Petition for Rehearing, the Mere Filing of a Petition for Rehearing Followed by a Decision by the Appellate Court Stating that it has no Jurisdiction to Consider the Petition for Rehearing, Cannot Operate to Extend the Time Allowed to Appeal from the Original Judgment.

The Appellee contends herein and suggests to this Court that it has no jurisdiction to entertain the appeal in this cause for the reason that the application for the appeal herein was not duly made within three months after the entry of the judgment appealed from therein.

Section 230, Title 28, U.S.C.A., provides as follows:

"No writ of error or appeal intended to bring any judgment or decree before a circuit court of

appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

It is well settled that the time within which an application for an appeal must be made is a jurisdictional requirement and when such requirement is not met, the appeal must be dismissed.

Northwestern Public Service Co. v. Pfeifer, 36 Fed. (2d) 5 (8th C.C.A. '29).
von Holt v. Carter, 56 Fed. (2d) 61 (9th C.C.A. '32).

Rule V of the Supreme Court of the Territory of Hawaii, 34 Haw. 958, with reference to a rehearing provides as follows:

> "A petition for rehearing may be presented only within twenty days after the filing of the opinion or the rendition of judgment unless by special leave additional time is granted during such twenty days by the court or a justice thereof; and shall briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be permitted to be argued unless a justice who concurred in the opinion or judgment desires it. If the case has been remitted to the lower court it may be recalled."

It is apparent then that the application for the appeal herein was not duly made within three months after the entry of the judgment of the Supreme Court filed on October 20, 1939. However, the application for the appeal herein was made within three months after the dismissal of the petition for a rehearing filed November 25, 1939 (Record p. 671).

It is the contention of the Appellee that the mere

filing of the petition for a rehearing in the Supreme Court under these circumstances was not sufficient to toll the statute, *(Title 28, U.S.C.A. Sec. 230)* for the reason that the Supreme Court of the Territory of Hawaii never entertained the petition because the court had no jurisdiction to entertain it.

In its decision dismissing the petition for a rehearing the Supreme Court of the Territory of Hawaii stated (Record p. 670),

> "Appellant having failed to obtain a recall of the mandate leaves this court wholly without jurisdiction and the petition for rehearing submitted herein, should be and is dismissed."

That the Supreme Court of the Territory of Hawaii under Rule V of Court, supra, and under the well settled general principle of law had no jurisdiction to entertain the petition for rehearing after the mandate had been returned to the lower court is sustained by the following authorities:

Browder v. M'Arthur (1822), 7 Wheat. 58, 5 L. Ed. 397.

Peck v. Sanderson (1855), 18 How. 42, 15 L. Ed. 262.

A petition for rehearing if seasonably filed and entertained suspends the time limited for an appeal until the petition is disposed of on its merits.

Texas Pac. Ry. Co. v. Murphy, 111 U. S. 488, 28 L. Ed. 492.

The Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 37 L. Ed. 986.

Thomas Day Co. v. Doble Laboratories, 41 Fed. (2d), 51 (9th C.C.A. '30).

It is the plain inference and intendment of these decisions that something more than mere filing of a petition for rehearing is necessary to suspend the time for filing an appeal from the final judgment of the court.

Klein v. So. Pac. Co., 140 Fed. 213 (C.C.D. Ore. '05).
Cambuston v. U. S., 95 U. S. 285, 24 L. Ed. 448.
Morse v. U. S., 270 U. S. 151, 70 L. Ed. 518.
Gypsy Oil Co. v. Escoe, 275 U. S. 498, 72 L. Ed. 393.
Analogous case:
O'Gwin v. U. S., 90 Fed. (2d) 494 (9th C.C.A.).

There is no question in the case at bar that the petition for rehearing herein was filed within the time required by Rule V of the Supreme Court. The sole issue is whether or not a petition for a rehearing can be entertained by the Supreme Court within the meaning of the rules set out in *Texas Pacific Ry. Co. v. Murphy, supra,* when the Supreme Court is entirely without jurisdiction to grant or deny the petition for a rehearing on its merits.

As to when a petition for a rehearing is *entertained* by a court and the exact meaning in this connection of the word "entertained" there is some judicial doubt and uncertainty as expressed by this court in *Thomas Day Co. v. Doble Laboratories, supra,* at page 52.

As a general principle of law, however, we submit the proposition as being elementary, that when a court

has no jurisdiction to hear a petition for rehearing on its merits it cannot entertain the petition for any purpose and the mere statement of the court in dismissing a petition for a rehearing on the ground that it had no jurisdiction to consider the petition should not be construed as being an "entertainment" of the petition by the court.

As said in the *New Orleans and Bayousara Mail Company v. Fernandez, et al.*, 12 Wall 130 (U. S.) 20 L. Ed. 249 at p. 251:

> "Where the Circuit Court is without jurisdiction, it is in general irregular to make any order in the cause except to dismiss the suit."

We therefore submit that this court has no jurisdiction to entertain the appeal herein for the reason that the application for the appeal was not duly made within the three months period required by the statute.

If the court is of the opinion that jurisdiction to entertain this appeal exists, then for the reason hereafter stated the Appellee presents a

STATEMENT OF FACTS

Although the statement of facts as presented by the Appellant is not flatly controverted by the Appellee, that statement is in a sense inaccurate in that it omits material portions of the evidence. The Appellee therefore feels constrained to present a more complete statement of facts in order that the issues raised may be better understood.

A summary of the salient facts brought out on the trial of this cause are as follows:—

On or about June 1, 1936 (Record pp. 65, 79), the Appellant was keeping a house of ill-fame on Muluwai Street in Wahiawa, City and County of Honolulu (Record pp. 58, 153-54) and working for her as prostitutes at that time were Lou Rodgers and two other girls (Record p. 155). On that date in the evening the Appellant and the three girls, one of whom was Lou Rodgers, were taken from the Appellant's house on Muluwai Street to the police station in Honolulu by a police officer, Perry W. Parker (Record pp. 65-67, 69). While the Appellant and Lou Rodgers were in the dormitory at the Police station (Record pp. 85-86, 135-36, 130) and again about two days to one week after the incident of June 1st (Record pp. 86, 137), the Appellant told Lou Rodgers, in discussing the raid of June 1st, that she wanted to wire the place with electricity (Record p. 86) as it would keep drunken soldiers, burglars and the police away (Record (pp. 87-88, 90, 134).

A short time after these two conversations, the Appellant spoke to John Kiehm, an automobile mechanic, (Record pp. 88-89, 156) and to another (Record pp. 89-90) about the installation of an electrical shocking device on the front door (Record pp. 167, 171), and that thereafter the Appellant obtained wiring and a metal plate (Record p. 96), which was installed by John Kiehm who placed the metal plate at the request of the Appellant on the outside of the front door (Record

p. 101) on or about July 11, 1936 (Record pp. 167-169). Electric Current drawn from a 115 volt electric line (Record pp. 168, 236) was directed into a radio transformer (Record p. 168) which boosted the voltage to about 600 volts (Record p. 323) and from there into the metal plate on the front door. This shocking device installed by John Kiehm was controlled from a knife type switch (Record p. 185) located approximately three feet (Record p. 182) from the front door in the inside of the house (Record pp. 91, 102, 167-168, 171, 177). This shocking device when touched by a person making a ground was imminently dangerous to life (Record pp. 536, 529).

During the month of July or August, 1936, one Lucy McGuire worked as a maid (Record p. 207) for the Appellant while the Appellant was operating a house of prostitution (Record pp. 211-214). During the period of her employment there the Appellant discussed the matter of the electrically charged front door and the location of the switch with her, and the Appellant told her that it was to be used to scare soldiers and *in case of a raid* (Record pp. 214-215).

On August 3, 1937 (Record p. 313), the date of the crime charged in the indictment, the Appellant was keeping on the same premises on Muluwai Street a house of ill-fame and in her employ were one Billie Florence Penland (Record p. 333) and one Marjorie Scott (Record pp. 359, 369) who were working as prostitutes on that day. Billie Florence Penland had been told by the Appellant of the presence and the purpose

of the electrical shocking device on the door, to-wit, that it was to be used in case of a raid (Record pp. 282-3, 284).

On that date about 8:45 o'clock in the evening one E. J. Burns, a police officer of the City and County of Honolulu, dressed in civilian clothes (Record p. 242), was admitted to the house of the Appellant by Billie Florence Penland (Record p. 244) at the request of the Appellant who knew of the presence of E. J. Burns at the front door (Record pp. 315-317). Billie Florence Penland invited Officer Burns into one of the rooms on the first floor of the house, and after accepting three dollars ($3.00), and after Burns was completely undressed, disrobed herself, sat on the bed and offered herself for the purposes of prostitution (Record pp. 245-6, 276, 280). At this time there was stationed outside the Appellant's house but not on her premises (Record p. 395) a group of police officers of the City and County of Honolulu under the command of Police Captain Clarence Caminos, one of whom was the deceased, Wah Choon Lee (Record pp. 393, 394, 451). By a prearrangement between Officer Burns and Captain Caminos, it was understood that after Officer Burns had entered the house, if he made an arrest and needed some assistance, he was to blow a police whistle (Record pp. 266, 411, 413, 419, 422-23, 437) and the police on the outside of the premises were to enter and assist him. When Billie Florence Penland had, in the opinion of Officer Burns, committed an offense against the laws of the Territory, to-wit, an attempt to com-

mit prostitution (Record p. 270), he blew his police whistle and the group of officers under the command of Captain Clarence Caminos moved towards the front door of the defendant's house (Record p. 473). The officers upon reaching the door heard a commotion in the house (Record p. 429) and demanded admittance (Record pp. 261, 375, 452, 478, 511) but the door failed to open. After demanding entrance, the deceased, Wah Choon Lee, reached up to pull the door open (Record pp. 398, 453) and his hands came in contact with the metal plate on the front door. He fell backwards and was pronounced dead about fifteen minutes later (Record p. 449). At about the time the deceased touched the metal plate the Appellant was in the house and her arm was seen by Officer Burns near the switch controlling the shocking device (Record p. 303). The Appellant, a few minutes after the door was opened for the police, admitted to Billie Florence Penland that she had pulled the switch (Record pp. 322, 347-48, 350) by the front door (Record p. 322). The only external injury was an electric burn on the right thumb (Record p. 534). The cause of death was electrocution (Record p. 498).

ARGUMENT

The argument of the Appellant will be answered in the same order that the points have been raised by the Appellant in her Brief. For convenience, the points of law involved will first be set out, and under each point of law will be noted the assignments of error which

are covered by the point of law involved.

POINT I

Where a Police Officer Is Invited Into a House of Prostitution, Apparently Open to Any Prospective Customer, at the Request of the Person in Control Who Does Not Know He Is a Police Officer, the Police Officer May Testify as to What he Sees or Hears Therein.

A

Assignments of Error Covered

Assignments of Error No. III (Record p. 10, Appellant Br. pp. 23, 52) will be argued under the above point of law.

B

Appellant's Contention

Appellant contends (Appellant Op. Br. p. 24) that the evidence complained of in these assignments of error violated the Appellant's rights under the Fourth and Fifth Amendments of the Constitution of the United States because Officer Burns' entry into the house was made without a warrant and *without the consent of the Appellant* and because his identity as a police officer was not disclosed before his admission.

C

Appellee's Contention

The Appellee contends that the Appellant, operating a public nuisance, to-wit, a house of prostitution, open to the public generally, consented to and requested the

entry of Officer Burns into her house without inquiry as to his identity. That under these conditions no warrant or other lawful process was necessary as Officer Burns was lawfully upon the premises at the invitation of the Appellant, and that being lawfully upon the premises no constitutional rights of the Appellant under the Fourth and Fifth Amendments of the Constitution of the United States were violated by the admission of Officer Burns' testimony as to what he saw and heard in the house after his admission therein.

D

Review of Applicable Evidence

The following uncontradicted evidence shows that Officer Burns was invited into the Appellant's house at the Appellant's request:—

Testimony of Billie Florence Penland: (Record pp. 315-317.)

"Q. Will you state whether or not on August 3, 1937, you saw Mr. Burns at Mrs. Warren's place?

A. Yes, sir.

Q. Will you please tell the jury the circumstances that you first saw him there, how you happened to first see him?

A. Well, I had to let him in the door.

Q. Where were you when he was at the door?

A. I was upstairs and Mrs. Warren told me to go downstairs and let him in.

. . . .

Q. How did you know there was someone at the front door?

A. There was a knock at the front door and Mrs. Warren looked out the window.

. . . .

Q. What did she say to you, if anything?

A. 'Go downstairs and let him in.' She said it was O.K.

Q. You let him in?

A. Yes."

The uncontradicted evidence establishes that the house entered by Officer Burns was a house of ill-fame (Record pp. 333, 357-60).

That any person applying at the door of the Appellant's house and believed to be a customer would be admitted is inferentially established by the evidence (Record pp. 372-74).

E

Discussion of Cases Cited by Appellant

The Appellant relies principally upon the case of *Gouled v. U. S.,* 255 U. S. 298, 65 L. Ed. 647, 41 Sup. Ct. Rep. 261. In that case the facts were these:—Gouled was charged with conspiracy to defraud the United States. Error was claimed on the admission in evidence of a paper surreptitiously taken from the office of the defendant in his absence by a private pretending to make a friendly call, who was acting under the direction of the Intelligence Department of the Army of the United States. The paper was relevant to the issue made on the trial, and its admission was considered a violation of the Fourth Amendment.

The Supreme Court in that case said on *page 306* *(L. Ed. p. 651)*:

> ". . . Whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by *stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secrctly made in his absence* falls within the scope of the prohibition of the 4th Amendment, and therefore the answer to the first question must be in the affirmative." (Italics ours.)

This statement points out the basic facts upon which the court relied in its decision. In the case at bar, it is to be noted there was no stealth or fraud, but rather an actual invitation on the Appellant's premises; there was no entry or search in the *absence of the defendant;* there was no seizure of tangible evidence. The case at bar is clearly distinguishable from *Gouled v. U. S., supra.*

The *Gouled case, supra,* must be limited to its particular facts.

Olmstead v. U. S., 277 U. S. 438, 72 L. Ed. 944, 488 Sup. Ct. Rept. 564.

In that case the court in commenting on the Gouled case said, at *page 464:*—

> "Gouled v. United States carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record. A repre-

sentative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the 4th Amendment. A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of a defendant and the taking away of something tangible."

And again on page 465:—

"Justice Bradley in the Boyd Case, and Justice Clarke in the Gouled Case, said that the 5th Amendment and the 4th Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words 'search and seizure' as to forbid hearing or sight."

In *Amos v. U. S.,* 255 U. S. 313, 65 L. Ed. 654, 41 Sup. Ct. Rep. 266, relied upon by the Appellant, the facts were briefly these:—

The defendant was convicted of concealing whisky on which the tax had not been paid. At the trial he presented a petition asking that private property seized in a search of his house and store, "within his curtilage," without warrant, should be returned. This was denied. A woman, who claimed to be his wife, was told by the revenue officers that they had come to search the premises for violation of the revenue law. She opened the door, they entered and found whisky. Further searches in the house disclosed more. It was held that this ac-

tion constituted a violation of the Fourth Amendment, and that the denial of the motion to restore the whisky and to exclude the testimony was error.

In discussing the contention that the constitutional rights of the defendant were waived (which was the issue) Mr. Justice Clarke, speaking for the court, said on page 317 (L. Ed. p. 656):

> "The contention that the constitutional rights of the defendant were waived when his wife admitted to his home the government officers, who came, without warrant, demanding admission to make search of it under government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected."

It can thus be seen that *Amos v. U. S., supra,* is also clearly distinguishable from the case at bar in that the court in the Amos case held there was implied coercion and hence no actual invitation by the defendant to go upon the defendant's premises. In the case at bar such a situation did not exist.

The case of *Terr. v. Ho Me,* 26 Haw. 331, also relied upon by Appellant, is not in point. There the facts were briefly that the government officers entered the defendant's home without a warrant under circumstances implying coercion. The question raised in that case was whether the defendant's action constituted a waiver by him of his constitutional privilege against unreasonable search and seizure. The court concluded

that the defendant in opening the door and permitting the officers to enter under the circumstances detailed by the witness did not operate as a waiver of his constitutional rights.

Finally the Appellant relies upon the case of *People v. Dent,* 19 N.E. (2d) 1020. It is apparent from a reading of that decision that the court primarily based its decision upon the lack of consent given to the officers by the defendant. The portion of the court's opinion quoted by the Appellant (Appellant's Br. p. 26) is mere dictum of the court so far as the consent feature is concerned. It is respectively submitted that the brevity of the opinion and the failure to cite authorities is indicative of the lack of careful consideration of the matter by the majority of the court. Chief Justice Shaw in his dissenting opinion and also Judge Stone in his dissenting opinion clearly outline the correct principles of law as laid down not only by the prior decisions of the Illinois court but also by the great weight of authority.

These cases then do not establish the contention of the Appellant that the testimony complained of in these assignments of error was admitted in violation of the Appellant's constitutional rights.

F

Authorities Supporting Appellee's Contention

The case of *Johnstone v. U. S.*, 1 Fed. (2d) 928 (9th C.C.A. '24) is illustrative of the common practice of allowing government agents to testify as to purchases

made after they have been invited on the premises of an establishment selling articles prohibited by law. In that case the defendant was convicted for violation of the National Prohibition Act. A government agent was allowed to testify as to three sales made to him by the defendant in the defendant's hotel room. The defendant moved to suppress such testimony because the officer had no search warrant. The court in denying the motion to suppress held that the officer could testify as to the purchases made by him.

In *Blanchard, et al. v. U. S.*, 40 Fed. (2d) 904 (5th C.C.A. '30), Cert. Denied 282 U. S. 865, 75 L. Ed. 765, the defendant was charged with the violation of the National Prohibition Act. The government was allowed to introduce testimony over the objection of the defendant of two government prohibition agents as to purchases of wine made by them from the defendant after being invited in the defendant's place of business. The court said, on *page 905,* when deciding that a search warrant was unnecessary:—

> "Under the circumstances, a search warrant was unnecessary, as the officers gained access to Blanchard's place of business by his invitation. When it came to their knowledge that the wine was intoxicating, they had the right to seize it without a search warrant."

Another case is *U. S. v. Smith,* 43 Fed. (2d) 173 (D. C. Texas). There the defendant was prosecuted for violation of the National Prohibition Act. At the trial government agents who had represented themselves as

customers for beer to the defendant and who had been invited into the defendant's premises where they saw others drinking beer and were sold beer by the defendant testified as to what they had seen and heard and found on the premises. The defendant moved to suppress all the evidence and the testimony of the officers as to what they had seen and heard and found on the grounds that this evidence violated the constitutional rights of the defendant under the Fourth and Fifth Amendments. The court, in overruling the motion to suppress, said on p. 174:

> "Defendant in his brief has entirely disregarded the controlling facts that the premises were being conducted as a public nuisance, and that liquor was sold therein to and in the sight of the officers, and has treated the matter as though it were a case of the entry by fraud or pretense of private property legitimately used for the purpose of a home and not as a place where liquor was sold and kept for sale, for the purpose of making an exploratory search for liquor which might be therein and the subsequent search of said premises. No such case is at all made here. . . .
>
> For the defendant to complain that his constitutional rights in the sanctity of his home have been invaded by an entry into his premises with his consent, for the avowed illegal purpose of buying liquor, followed by the sale of it thereon, appears to me, in view of the law which forbids the use of a man's premises for the sale of intoxicating liquor and declares such premises so used to be a public nuisance, to be grotesque, a 'reductio ad absurdum' in application, of a constitutional principle of profound dignity and importance; while the claim that the subsequent search without war-

rant, made by the officers after they had observed others drinking and had themselves purchased intoxicating liquor there, was unlawful, is contrary to the uniform current of authorities. *Jordan v. U. S.* (C.C.A.) 2 F. (2d) 598; *Sayers v. U. S.* (C.C.A.) 2 F. (2d) 146."

In *Marshall v. City of Newport* (Ky. '23) 255 S.W. 259, the defendant was charged with the running of a house of prostitution. Part of the testimony complained of consisted of that given by police officers of the city who visited the defendant's house, entered it and discovered evidence indicating that it had been and was then used as a house of prostitution. The defendant contended that these witnesses should not have been permitted to testify as to what they discovered in the house because the investigation conducted by them was without warrant or authority of law. The court said, on page 260, on passing on this contention as follows:—

> "The officers had no search warrant, and admittedly no offense was committed in their presence, but their evidence shows, and it is not contradicted by appellant, that the entry into and the examination of the house was with the consent of appellant. In these circumstances the testimony was competent. *Com. v. Meiner,* 196 Ky. 840, 245 S.W. 890."

POINT II

Testimony Concerning the Subject Matter of an Illegal Search and Seizure, Which Is Based Upon Information Obtained From a Source Independent of the Illegal Search and Seizure, Is Not Ren-

dered Incompetent and Inadmissible Because the Authorities Responsible for the Search and Seizure Had Knowledge of the Subject Matter of the Search and Seizure and Questioned the Witnesses Giving the Testimony, Before Trial, in Regard Thereto.

A

Assignments of Error Covered

This point of law applies to Assignments of Error IV, V, VI (Rec. pp. 14-24 Appellant's Brief pp. 26-27, 55-64).

B

Review of Evidence Showing Nature and Source of Evidence Attacked

The evidence conclusively shows that the witnesses complained of testified at the trial from their own memory based on their observation of the equipment in the Appellant's house, unaffected by what happened at the police station when the equipment was exhibited to them.

It is singular that the Appellant in quoting portions of the testimony of each witness in her Brief, omitted material testimony showing the absence of the effect of the incident at the police station upon the testimony given by these witnesses at the trial, for example:—

(1) Concerning Assignment of Error IV

The testimony of Lou Rodgers on this issue (the subject matter of Assignments of Error of No. IV) on redirect examination was as follows:—

"Redirect Examination by Mr. Young (Rec. pp. 151-2):

Q. Miss Rodgers, when the police had you at the police station shortly after the death of Wah Choon Lee you say they had some electrical equipment in there?

A. They did.

Q. And did they ask you if that equipment was the same as was in there when you were there?

A. They asked me, yes.

Q. And that was how they got the lead?

A. Yes.

Q. And then they questioned you about what they knew personally about the equipment?

A. They did.

Q. How you knew it was in the house and how it was put in there and all such things?

A. They did.

Q. And everything you told the police was based upon your memory and your own observation and not upon what you saw in the police station?

A. Yes, sir."

And in this connection it is pertinent to review the following remarks of the trial court,

". . . The testimony of this witness (Lou Rodgers) shows throughout her direct and cross-examination the evidence is based upon her memory at the time she lived in that house, saw the equipment being installed and had an opportunity to see it, test it and describe it. Although she did make the statement in answer to Mr. Dwight that the entire statement made to the police was based on the equipment there in her presence, she also made the statement on redirect, in answer to Mr.

> Young, that her testimony here in this Court was based upon her memory at the time she lived there. Certainly the Court, under the authority in the Silverthorne case, denies the motion."

that there was no connection between the alleged incident at the police station and the testimony given at the trial. (Rec. p. 160.)

(2) Concerning Assignment of Error V

John Kiehm's testimony (the subject matter of Assignments of Error No. V) on this issue is clarified by the testimony given on redirect examination as follows:—

> "Redirect Examination by Mr. Young (Rec. p. 192):
>
> Q. Mr. Kiehm, everything you have testified to here this morning is from your own memory of what happened?
>
> A. Yes, from my own memory.
>
> Q. And what you put in the house?
>
> A. Yes.
>
> Q. And that was not influenced in any way by what the police told you?
>
> A. No."

And again the remarks of the trial court are pertinent as showing the absence of any effect on this witness' testimony (Rec. pp. 201-2):

> "Witness Kiehm also testifies from his independent knowledge, free and clear of the illegal search and seizure. His knowledge of how the electrical equipment looked and how it was put in and installed was based upon his actual experience

and personal knowledge thereof. Here again the mere fact that he was shown that equipment, which had been illegally seized, is not enough to bring his independent personal knowledge of that equipment within the ruling of this Court in respect to the illegally seized evidence, as was definitely stated in the Silverthorne case in 251 U. S. at page 392, (reading) . . . which in that case was copies of papers illegally seized. Here the evidence of Rodgers and Kiehm was gained from an independent source and that may, therefore, be proved like any other evidence based in this case upon their personal and independent knowledge and clearly not solely gained by the government's own wrong nor dependent upon that wrong. Consequently, the Court overrules the defendant's motion to strike this evidence."

(3) Concerning Assignment of Error VI

The record of the testimony of Billie Florence Penland on this issue (complained of in Assignment of Error No. VI) reveals that on redirect examination she testified at the trial from her memory as to what she knew of the equipment in the defendant's house.

"Q. Now, everything that you have testified here this morning, is that based on your memory of what happened that night?

A. Yes, sir.

Q. I understand from your cross-examination you were a bit hesitant down the police station to testify or give a statement about 'Speed' Warren because she had been good to you and you wanted to protect her?

A. Yes, sir.

Q. You finally gave a statement?

A. Yes.

Q. Is that statement the truth?

A. Yes, sir.

Q. Based upon your memory of what happened that night?

A. Yes, sir." (Rec. p. 349).

(4) The Police Source of Information Was Prior to and Independent of the Illegal Search

The record also shows that the Police Department had knowledge of the nature of the device which caused the death of Wah Choon Lee prior to the time that the illegal search and seizure as ruled by the trial court was made. (Rec. pp. 404, 406, 440-41.)

The evidence is uncontradicted that the witnesses Penland, Officer Burns and Lou Rodgers were present in the house when the death occurred. Also the sudden nature of the deceased's fatal injury (Rec. p. 404) together with the discovery at the time, of an electric wire soldered to the metal plate on the door which the deceased touched, by Officer Caminos (Rec. p. 406) proves that the police had a source of information to investigate, as to the cause of the deceased's death, independent of the knowledge obtained from the subsequent search and seizure.

(5) Summary

Summarizing the facts then, it is clear (1) that the police obtained the identity of the witnesses present (whose testimony is complained of in the above Assignments of Error) at the scene of the killing without the

aid of the illegally seized evidence; (2) that the police had knowledge of the death of the deceased and the general nature of the electrical equipment causing the deceased's death before the illegal search and seizure was made; (3) that the witnesses, whose testimony is complained of, obtained their knowledge and information from their observation and experience with the equipment prior to the illegal search and seizure; and finally the testimony of these witnesses given at the trial was not influenced in any manner by what transpired at the Honolulu Police Station after the search and seizure.

This is directly contrary to the statement made in the Appellant's Brief (p. 35) that the government had no knowledge of the existence of the electrical equipment until it was illegally seized. It is therefore apparent that either the Appellant is erroneously proceeding upon the theory that the government did not have any independent knowledge of the electrical equipment or else she is evading the facts as they appear in the record quoted above.

C

Discussion of Appellant's Authorities

Appellant relies upon *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, 64 L. Ed. 319, 24 A.L.R. 1426, 40 Sup. Ct. 182, but that case has no application to the case at bar. In that case the court found that, without a shadow of authority, the government officers had made a clean sweep of all the books, papers, and docu-

ments in the office of the company while its officers were under arrest. Although the court later ordered their return, these documents were copied and photographed, and on the basis of knowledge obtained from them the government issued a subpoena to compel the production of the originals. The Supreme Court in holding invalid the subpoena held that the government could not, while in form repudiating the illegal seizure, maintain its right to avail itself of the knowledge obtained by that means, which otherwise it would not have had. In other words, that case held that the government could not use information which came from the source of the illegal search and seizure, and the court indicated and limited its holding as follows, at page 392 (L. Ed. p. 321):

> "Of course this does not mean that the facts thus obtained become sacred and inaccessible. *If knowledge of them is gained from an independent source they may be proved like any others,* but the knowledge gained by the government's own wrong cannot be used by it in the way proposed." (Italics ours.)

The Appellant relies (Brief, pp. 33, 34) on the case of *Nardone v. U. S.,* (Advance Op.) 84 L. Ed. 227; 302 U. S. 379, 82 L. Ed. 314; 106 Fed. (2d) 41. From a reading of these opinions and principally the last case, to-wit, in *84 L. Ed. 227,* it is clear that they do not support the contention of the Appellant. There the Supreme Court of the United States was primarily concerned with the question of whether or not evidence obtained as a direct result of illegal wire-tapping was admis-

sible. No situation existed in those cases as in the case at bar of an absolutely independent source of information. In fact, it is interesting to read the following statement in *84 L. Ed. 227,* (Advance Op.) where the court in discussing the doctrine of the independent source stated, page 229:

> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

D

Appellee's Authorities

Exactly what is a source independent of the illegal search and seizure does not clearly appear in the *Silverthorne case, supra,* it would seem however, that question would necessarily depend upon the facts and circumstances of each particular case coming before the court. The following cases throw light upon the independent source doctrine set out in the Silverthorne case.

In *Cohen v. U. S.,* 36 Fed. (2d) 461 (3rd C.C.A. '29), cert. denied 281 U. S. 742, 74 L. Ed. 1156, 50 S.Ct.Rep. 348 the defendant was convicted of the crime of perjury. He assigned as error the admission into evidence of the testimony of one Charles Klein, assistant attorney general, which consisted of information of the existence of certain records which Klein had observed.

These records had been illegally seized by the government's agents and suppressed by the trial court. Klein, although instrumental in the prosecution of the case and knowing of the issuance of the illegal search warrant, was not present when the records were discovered by the searchers but was called to the house after the records were discovered by the searchers and invited into the house and shown the records by one Albus, who was in control of the premises.

The defendant contended that under the doctrine of the Silverthorne case, supra, Klein should have been deemed in law to be a member of the searching party; that he gained admittance to the Appellant's residence by virtue and under the authority of the illegal warrant; and that under the law the evidence obtained, *either directly or indirectly,* by an unlawful search and seizure must be suppressed. The court, in holding Klein's testimony admissible said in part, pp. 463-4:

> ". . . there was a mental connection between the illegal search and seizure and Klein's subsequent actions. There must be an actual connection. Klein was not directly or indirectly a member of the searching party, nor did he enter the house under authority of the illegal search warrant. However unfortunate for Cohen, he entered upon invitation of one of the occupants, who, without any request from Klein, took him to the cellar where the incriminating property was concealed. Thus Klein entered and made his discovery by reason of the actions of Albus, lawful because done in his own home and lawful also because not associated with the search. The fact that Klein obtained and was allowed to produce evidence which

> the officers operating under an illegal search warrant obtained but could not testify to does not answer the question whether Klein's testimony should also have been suppressed. The question turns on the lawfulness of Klein's entry into Cohen's home and, when there, the lawfulness of his discovery. We find both were lawful and the evidence was admissible."

In *Wiggins v. U. S.,* 64 Fed. (2d) 950, (9th C.C.A. '33), cert. denied 290 U. S. 657, 78 L. Ed. 569, 54 S.Ct.Rep. 72, the defendant was charged with evasion of income tax. The government agents obtained information as to the facts of the offense from two sources, namely, (1) seizure of the defendant's books at his office during his absence, and (2) testimony of the defendant's nurse and secretary who was incidentally the informant in the case. From the knowledge based on the information obtained from these two sources, the government agents obtained a confession from the defendant. The court, in commenting upon the defendant's objection that the confession was obtained by means of knowledge obtained from the unlawful search and seizure of his books, said at page 951:—

> "Although defendant has abandoned his objection to the admission of the confession made on the ground that the interrogation by the government agents was based on information obtained by them without his knowledge, through the alleged illegal search and seizure hereinabove referred to, it should be noted that the officials had received similar information from defendant's secretary; this alone sufficed as a basis for their questions. Cf. *Silverthorne Lumber Co. v. U. S.,* 251 U. S. 385,

392, 40 S.Ct. 182, 64 L. Ed. 319, 24 A.L.R. 1426 (1920)."

It is to be noted that the court cited the *Silverthorne Lumber Co. case, supra,* and although this language was obiter dictum, it illustrates the application of the independent source doctrine which we quote again in the language of the Silverthorne case,

> "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

In the case at bar the police authorities had knowledge from three sources, to-wit, (*a*) knowledge obtained from the search and seizure of the existence of the equipment, and (*b*) knowledge obtained from witnesses, Lou Rodgers, John Kiehm, Billie Florence Penland and Lucy McGuire, as to the installation and presence in the Appellant's house of this equipment; (*c*) Knowledge obtained from their presence and *observation at the scene of the homicide.*

It is respectfully submitted that the mere fact that the police had the information obtained from the search and seizure at the time when they checked and questioned the witnesses, their other source of the information, does not make the testimony of these witnesses inadmissible, because such testimony under all the facts came from an absolutely independent source.

To adopt such a rule of law, would in the words of Judge Seabury (24 Cornell L.Q. 376) give to these con-

stitutional provisions for the protection of liberty such fanciful and far fetched interpretations as to convert them into a weapon by which criminals can make war safely upon organized society and its law-abiding members.

POINT III

Where the Facts in the Record and the Assignments of Error Do Not Indicate How a Defendant Has Been Injured by the Application of an Alleged Unconstitutional Statute, the Court Will Decline to Pass on the Constitutionality of the Statute as an Abstract Proposition of Law.

A

Assignments of Error Covered

This point of law is applicable to the Appellant's Assignments of Error VII, VIII, IX, X and XI (Rec. pp. 24-33) in which the Appellant has raised the issue of the unconstitutionality of Section 5404 of the Revised Laws of Hawaii 1935.

B

The Territorial Supreme Court Declined to Pass on the Constitutionality of the Statute

The Supreme Court of the Territory of Hawaii in refusing to pass upon these assignments of error (Rec. p. 667) stated as follows:—

> "The constitutionality of section 5404, R.L.H. 1935, was not in issue and that question should not have been injected into the case. While prosecution's instructions numbers 12, 12A and 14 might

well have been refused by the court, their effect was to accord the defendant an advantage to which she was not entitled. But of this she cannot complain. For the same reason defendant's instructions numbers 16, 18 and 28 were properly refused."

In holding that the constitutionality of Section 5404 of the Revised Laws of Hawaii 1935 was not in issue under the facts of this case, the Supreme Court of the Territory adopted the view that instructions on the law of arrests without a warrant were inapplicable to the issues in the case because (1) the facts in the record could not in the remotest degree support a finding that the deceased was a trespasser at the time of his death (Rec. pp. 666-67) and (2) even under the assumed theory of the Appellant that the deceased was a trespasser, the Appellant under the applicable rule of law would not be justified in deliberately placing and using a deadly instrumentality on her premises in the manner shown by the evidence. (Rec. pp. 662-3.)

C

Appellant's Theory on Application of the Statute Complained of

The Appellant in her Brief (p. 40) argues that it was necessary under the issues to determine whether or not the deceased, a police officer, was lawfully upon the premises of the Appellant and that this question was dependent upon the right of a police officer to make an arrest without a warrant. The Appellant contends that although the trial court was correct in

instructing the jury on the law of arrests the trial court's rulings on the instructions complained of were erroneous because they were based upon Section 5404 of the Revised Laws of Hawaii 1935, which is unconstitutional.

D

Appellee's Contention

The Appellee contends that since neither the assignments of error involved or the Brief of the Appellant point out how she was directly injured under the issues in the case by the application of the statute attacked she has not properly raised the question of the constitutionality of the statute. Appellant is in effect seeking to have the court declare the statute unconstitutional as an abstract proposition of law.

No question is raised by the Appellant that there was any unreasonable arrest or attempt to arrest her in violation of her rights under the Fourth and Fifth Amendments of the Constitution of the United States. There being therefore no issue of an unlawful arrest it is difficult to see what difference the constitutionality of the statute would make in the case.

E

Authorities to Support Appellee

Courts will deal with cases upon the basis of the facts disclosed, never with non-existent and assumed circumstances.

Associated Press v. Nat. Lab. Bd., 301 U. S. 103, 57 Su. Ct. 650, 81 L. Ed. 953.

Constitutional questions are not to be decided hypothetically; nor abstractly.

Anniston Mfg. Co. v. Davis, 301 U. S. 337, 57 Su. Ct. 816, 81 L. Ed. 1143.

A court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it.

Tenn. Pub. Co. v. Am. Nat. Bank, 299 U. S. 18, 57 Su.Ct. 85, 81 L. Ed. 13.

Assailants of a statute on constitutional grounds must show the application of the statute and that they are thereby injuriously affected.

Thurston v. U. S., 241 Fed. 335 (5th C.C.A.) Cert. den. 245 U. S. 646, 62 L. Ed. 529.

Turpin v. Lemon, 187 U. S. 51, 47 L. Ed. 70.

Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226, 80 L. Ed. 1155.

POINT IV

Section 5404 of the Revised Laws of Hawaii 1935 Does Not Contravene Amendment IV of the Constitution of the United States and Is Therefore Not Unconstitutional.

A

Assignments of Error Covered

This point of law, as well as Point III supra, covers Assignments of Error VII, VIII, IX, X and XI.

Assuming arguendo that a decision on the constitutionality of Section 5404 of the Revised Laws of Hawaii 1935 is necessary, both because it is in issue under the facts of the case, and also because Appellant has

pointed out under the facts how she was injured by the application of the statute, then the Appellee maintains that the statute is constitutional.

B

Appellant's Contention

Although the contention of the Appellant with reference to these Assignments of Error is not clearly perceived from a study of her Brief (pp. 40 to 49) it appears that the Appellant's position is that the statute is unconstitutional as violating the Fourth Amendment of the Constitution of the United States because (1) it authorizes a police officer to make an arrest without a warrant for a misdemeanor not committed in the officer's presence; and (2) because it fails to distinguish between arrests in case of felonies and arrests in case of misdemeanors (Appellant's Br. pp. 42-43).

C

Contention of Appellee

Appellee maintains (1) that the statute in question does not authorize a police officer to make an arrest without a warrant for a misdemeanor not committed in the officer's presence; (2) that the failure to distinguish in the statute between arrests in case of felonies and arrests in case of misdemeanors is not of itself a violation of the constitutional amendment claimed to be infringed.

The Appellee has no quarrel with any of the authorities cited by the Appellant in his argument or the prin-

ciples of law which these cases expound. Their citation however adds nothing to the issues herein.

Repeatedly Appellant has stated that the statute and the instructions complained of specifically authorize an arrest for a misdemeanor not committed in the officer's presence without a warrant. In fact, nowhere does language remotely similar appear in the statute or the instructions. The Appellant, rather by her construction has read this statement into the statute and the instructions. She is building a straw man and then proceeding to tear it down.

The Appellant in discussing Assignments of Error X and XI involving the refusal of the trial court to give the Appellant's requested Instructions 12 and 18 makes the statement (Appellant's Brief pp. 39-40), without support in the record, that the Appellee objected to the giving of these instructions to the jury (why the Appellee's objection in the trial court is material here is not clear) because they were in conflict with Sec. 5404, R.L.H. 1935. It would be more reasonable to presume that the instructions were refused, not because they did not expound correct principles of law, as far as they went, but rather because they were inapplicable to the issues—there being no claim in the case so far as Appellant or the deceased was concerned of an improper arrest.

We cannot follow the argument of Appellant on pp. 44-49. That argument is confusing and inconsistent especially in connection with the reference to In-

struction No. 34 (Rec. p. 46) which was not assigned as an error in this Appeal.

D

Appellee's Argument and Authorities

Before discussing the constitutionality of *Sec. 5404, R.L.H. 1935,* we set out for convenient reference the statute attacked and Amendment IV of the Constitution of the United States which the statute is alleged to have contravened.

Amendment IV of the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 5404, R.L.H. 1935 provides as follows:

> "Policemen, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense."

(1)

It is to be noted that there is no specific prohibition in the language of the Fourth Amendment of the Constitution of the United States against either an arrest

without a warrant or an arrest upon reasonable suspicion or probable cause.

It is the well settled law that the Fourth Amendment of the Constitution of the United States does not prohibit arrests without a warrant.

Carroll v. U. S., 267 U. S. 132, 69 L. Ed. 543.

Terr. v. Kataoka, 28 Haw. 173.

The only prohibition in the Fourth Amendment is against unreasonable searches and seizures and unreasonable arrests.

Lambert v. U. S. (9th C.C.A.), 282 Fed. 413.

Peru v. U. S. (8th C.C.A. '25), 4 Fed. (2d) 881.

Agnello et al. v. U. S. (2nd C.C.A.), 290 Fed. 671, reversed on another ground, 269 U. S. 20, 70 L. Ed. 145.

The court in *Lambert v. U. S., supra,* said on page 417:—

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure (or arrest) is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case." (Parenthetic matter ours.)

In order to determine what is an unreasonable arrest under the Fourth Amendment of the Constitution of the United States with respect to arrests for misdemeanors by a police officer, it is necessary to review the leading Federal cases.

That an arrest made for a misdemeanor without a warrant upon *mere suspicion* is unreasonable, we

agree is the settled law. (The jury in the case at bar, at Appellant's request, were so instructed, Rec. p. 600.)

Carroll v. U. S., 267 U. S. 132, 69 L. Ed. 543.

Equally well settled is the rule that an arrest without a warrant for a misdemeanor actually committed in the presence of an officer is reasonable and not a violation of the constitutional guarantees of the Fourth Amendment.

Carroll v. U. S., supra.

And it is likewise well established that when a police officer has probable cause to believe that a misdemeanor is being committed in his presence, he may make arrest without a warrant and such an arrest is reasonable. *That in such a case the probable cause which will justify arrest for a misdemeanor without a warrant must be a judgment based on personal knowledge acquired at the time through the senses, or inferences properly to be drawn from the testimony of the senses.*

Garske v. U. S. (8th C.C.A. '24), 1 Fed. (2d) 620.

Schroeder v. U. S. (9th C.C.A.), 14 Fed. (2d) 500.

Winkler v. U. S. (9th C.C.A.), 297 Fed. 202.

Agnello v. U. S., 290 Fed. 671.

6 C.J.S. 595.

In the case of *U. S. v. Rembert* (D.C. Tex. '22) 284 Fed. 996, the Court, after reviewing many authorities, said on page 1001:—

"Now it appears from these decisions that it is not essential that, in making an arrest without warrant, the officer must absolutely know that an

offense is being committed; *he must believe it is being committed, and must believe upon the evidence of his own senses in the case of a misdemeanor*, and in the case of a felony upon credible evidence of other persons." (Italics ours.)

And again on page 1006:—

". . . . Wherever a felony has been committed, either in the presence of the officer or as to which the officer has a belief induced by reasonable grounds, *or a misdemeanor has been committed in the presence of the officer, that is, of which the officer has evidence by his senses sufficient to induce a belief in him based upon reasonable grounds of belief,* an arrest may be made without a warrant, and the instruments and evidence of crime seized." (Italics ours.)

To the same effect is the case of *U. S. v. Stafford* (D.C. Ky. '23) 296 Fed. 702, where the Court said on page 704:—

"Resort has to be had to the common law to determine that matter (whether an arrest is lawful); and according thereto, as stated, an arrest, and hence a subsequent search and seizure, is always lawful where a criminal offense is being committed in the officer's presence, and also, according thereto, such *an offense is so committed where things are observed by the officer which, viewed in the light of common knowledge, afford reasonable ground for suspecting that such is the case.*" (Parenthesis and italics ours.)

It can thus be seen from these Federal cases that although a police officer may not arrest for a misdemeanor not committed in his presence without a warrant *he may arrest for a misdemeanor without a warrant*

where he sees, hears or detects by his senses some act or acts committed in his presence which gives him probable cause or reasonable grounds to suspect that a misdemeanor is being or about to be committed. This law is perfectly consistent with Sec. 5404, Revised Laws of Hawaii 1935, Supra.

For an illustrative application of the statute to such a case see *Terr. v. Sing Kee,* 14 Haw. 586. In that case an arrest for unlawful sale of liquor (a misdemeanor) without a warrant was pronounced lawful by the court where the facts showed that the officers were fifty feet away from the store when they saw the defendant deliver a bottle of liquor to a person. The officers rushed in and arrested the defendant. Obviously from that distance they could not positively say that liquor had been sold in fact, but they certainly had reasonable grounds of suspicion.

See also as illustrative:

> *Forsythe et al. v. Ivey* (Miss. '32), 139 So. 615.
> *Goodwin v. State* (Tenn. '24), 257 S.W. 79.

For, as the Court in *Goodwin v. State, supra, at page 80,* said:—

> ". . . His conduct was suspicious, and such as naturally to create the impression that he was intoxicated, thus affording *abundantly reasonable grounds for his arrest.* Although a man be in fact sober, if he so conducts himself in public as to justify the impression that he is drunk, whether he does so purposely or otherwise, he subjects himself to arrest, and the arrest is lawful." (Italics ours.)

A cursory examination of Sec. 5404, R.L.H. 1935, supra, will reveal that it does not state, as the Appellant contends, that an arrest can be made for a misdemeanor without a warrant upon mere suspicion, nor does it state that an arrest may be made without a warrant for a misdemeanor which is not committed in the officer's presence. It does state, however, that a policeman may arrest without a warrant "such persons as may be found *under such circumstances as justify a reasonable suspicion* that they have committed or intend to commit an offense." And this Court should give this phrase the construction which makes it conform to the constitutional requirement of reasonable arrests as outlined in the Federal authorities cited above, to-wit:—

That in the case of an arrest for a misdemeanor, the *circumstances* which will justify a *reasonable suspicion* must be acts or sense stimulants occurring within the sense perception of the arresting officer.

Since this construction is reasonable and explains and amplifies the statutory language directly preceding, to-wit, *"even in cases where it is not certain that an offense has been committed"* and will bring the statute in harmony with the Constitution of the United States and the decisions thereunder, this court should so construe this statute. If the statute is open to more than one construction that construction which renders it free from constitutional objection, if available, *must be adopted.*

Nat'l Labor Rel. Bd. v. Jones E.L.S. Corp., 301 U. S. 1, 81 L. Ed. 893.

(2)

We find it difficult to follow Appellant's argument that the statute in question is unconstitutional because it fails to distinguish between arrests in cases of felonies and arrests in misdemeanors. The contention is novel and unique. No authorities are set forth in support of it. It is clear that the Fourth Amendment to the Constitution of the United States requires no such distinction. Judicial construction of the Amendment has, it is true, laid down a different rule with reference to arrests without a warrant in misdemeanors and felonies. The rule is more stringent and rigid in its requirements with reference to misdemeanors. Section 5404 of the Revised Laws of Hawaii 1935, being valid with reference to misdemeanors, under the authorities cited (pp. 38-43 herein), it certainly can be no objection that the statute applies the same rigid requirements to arrests in cases of felonies.

In conclusion, it is important to note that the statute in question has been in effect in the Territory of Hawaii for many decades. It is found in the Penal Code of 1869. In addition the Supreme Court of the Territory of Hawaii has in the following cases acted under this statute:—

Terr. v. Hoo Koon, 22 Haw. 597.

Terr. v. Sing Kee, 14 Haw. 586.

Prov. Gov't v. Caecires, 9 Haw. 522.

The fact of the law having stood so many years without challenge gives a presumption in favor of its constitutionality, besides the general presumption that way in favor of statutes.

Marx v. U. S. (9th C.C.A. '38), 96 Fed. (2d) 204.

We respectfully submit that the statute upon its face and as applied to the facts and issues in this case is not in violation of the Fourth Amendment of the Constitution of the United States.

CONCLUSION

It is therefore respectively submitted that the appeal should be dismissed for want of jurisdiction, or the judgment appealed from affirmed.

Dated at Honolulu, T. H., this 3rd day of October, A. D. 1940.

Respectfully submitted,

(s) Chas. E. Cassidy
CHAS. E. CASSIDY
Public Prosecutor of the
City and County of Honolulu

(s) Kenneth E. Young
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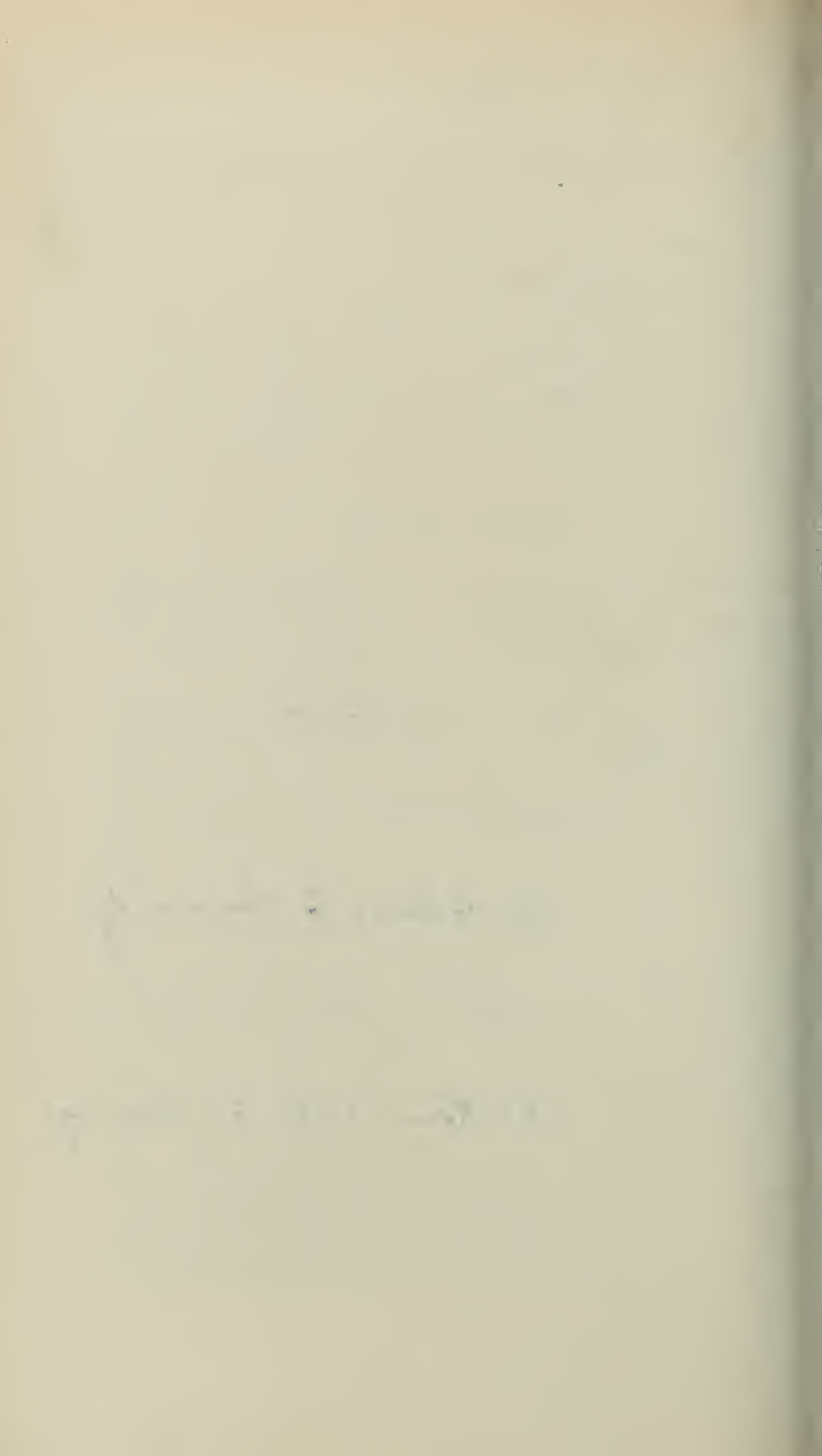


Due service and receipt of three copies of the within Brief is hereby admitted this 3rd day of October, 1940.

(s) Charles B. Wright
Attorney For Appellant.

No. 9506

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

ILENE WARREN, ETC.

Appellant,

v.

TERRITORY OF HAWAII

Appellees.

BRIEF OF APPELLANT

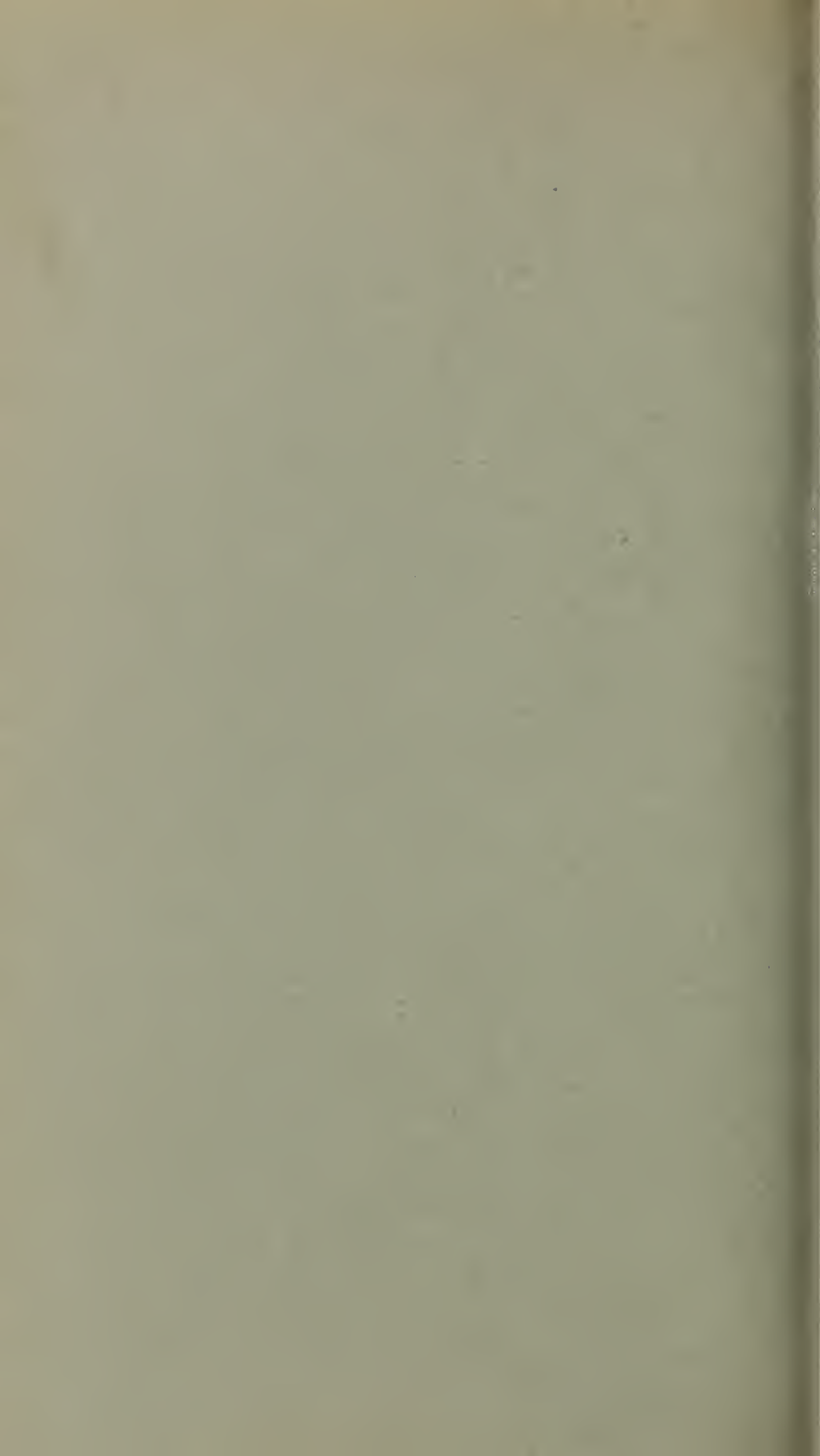
On Appeal from the Supreme Court of the Territory of Hawaii

CHARLES B. DWIGHT,
Attorney for Ilene Warren, etc.
Appellant

Filed this................day of September, 1940.
PAUL P. O'BRIEN, Clerk

By..
Deputy Clerk

FILED
SEP 19 1940
PAUL P. O'BRIEN,
CLERK



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No. 9506

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LENE WARREN, ETC.

Appellant,

v.

ERRITORY OF HAWAII

Appellees.

BRIEF OF APPELLANT

On Appeal from the Supreme Court of the Territory of Hawaii

OPINION BELOW

The judgment of the Supreme Court of the Territory f Hawaii was filed on October 20, 1939, and the decision pon the petition for a rehearing was entered and filed on November 25, 1939. (Rec. 647, 669.)

STATEMENT OF THE PLEADINGS AND THE FACTS

This cause has come to this Court upon the appeal of he defendant, ILENE WARREN alias "SPEED" WARREN, rom the judgment of the Supreme Court of the Territory

of Hawaii entered October 20, 1939 pursuant to a decision of said Court rendered and filed on October 20, 1939 dismissing the writ of error of defendant from the verdict, judgment and sentence of the Circuit Court of the First Judicial of the Territory of Hawaii, and sustaining the judgment and sentence of said Circuit Court.

The appellant invokes the jurisdiction of this Court under Section 128A of the Judicial Code as amended by Act of February 13, 1925 (28 U.S.C.A. Sec. 225).

The defendant was indicted on the 5th day of August, 1937, by the Grand Jury of the Circuit Court of the First Judicial Circuit of the crime of murder in the second degree.

A plea of not guilty was entered by the defendant and the cause came on regularly for trial on the 2nd day of February, 1938, before the Circuit Court of the First Judicial Circuit, Honorable Louis Le Baron presiding, with a jury. At the conclusion of the evidence and after the argument of counsel and the instructions given by the Court, the Jury on the 18th day of February, 1938, returned its verdict finding the defendant guilty of manslaughter with leniency recommended.

The defendant excepted to the verdict and thereafter filed her motion for a new trial and supplemental motion for a new trial, both of which were denied by the Circuit Court to which rulings the defendant duly excepted and which exceptions were allowed by the Court. The defendant was sentenced to the term provided for the crime of manslaughter.

Thereupon the appellant gave notice both oral and written of her intention to sue out a writ of error to the Supreme Court of the Territory of Hawaii and within

the time prescribed by law, did apply for a writ of error.

Throughout the trial the Circuit Court committed manifest, material and prejudicial error in overruling objections interposed by the defendant to the admission of evidence by the prosecution, in sustaining objections of the prosecution to the introduction of material evidence by the defendant, in denying the motions made by the defendant and in granting motions made by the prosecution over the objection of the defendant, in giving to the jury certain of prosecution's requested instructions over the objection of the defendant, in refusing to give certain of defendant's requested instructions, in accepting and filing the verdict of the jury and in denying the defendant's motion for a new trial and supplemental motion for a new trial and imposing the sentence and judgment upon the defendant.

Exceptions being noted to the rulings of the Court as appears in the record and certain of which rulings, particularly the rulings involving Federal questions, is before this Court as appears in the assignment of errors on file herein.

The judgment and sentence of the Circuit Court having been sustained by the Supreme Court of the Territory of Hawaii, and the Supreme Court having denied the petition of the appellant for a rehearing, within the time provided by law, a petition for appeal, notice of appeal and assignments of error were duly filed and the appeal perfected from the judgment of the Supreme Court to this Honorable Court. The cause, therefore, is now before this Court for review.

The appeal to the Court below from the judgment and sentence of the Circuit Court of the First Judicial Cir-

cuit of the Territory of Hawaii, was by writ of error. By Statute (Sec. 3553 Chap. 100 R. L. of Haw. 1935) the judgment of the Circuit Court, the pleadings and such other papers and things including the verdict, rulings, notes of exceptions, motions, clerk's minutes and transcript of the evidence, all of which were designated in the praecipe filed by the plaintiff-in-error in the Court below, the appellant herein, became a part of the record of the cause in the Supreme Court of the Territory of Hawaii, and upon which record the Supreme Court determined the issues raised by the assignment of errors and upon which record the judgment of the Court below was based. The rulings, the errors alleged as to the admission or rejection of evidence, to the instructions given and the instructions refused, together with the grounds of objection urged at the trial, and the exceptions taken to the rulings of the trial Court, appear in full in the transcript of the evidence which is, under the Statute, a part of the record of the Supreme Court.

A bill of exceptions, therefore, under the practice in the Territory of Hawaii and under the Statute is unnecessary.

STATEMENT OF THE CASE

A complete transcript of the evidence being a part of the record in the Court below, the material portions of the evidence will be specifically referred to under the argument upon the assignment of errors where the same is applicable, and therefore, it will only be necessary to briefly set forth the statement of the case, setting forth the questions involved and the manner in which they are raised.

Prior to the actual trial the Court, upon the motion of the defendant, ordered suppressed all evidence obtained by the prosecution as a result of the illegal search of the premises of the defendant and the seizure therein of certain electrical apparatus, to-wit, the wiring, transformer, metal plate and other electrical attachments (Rec. p. 42).

The Territory of Hawaii called as its witnesses, Ernest Wm. Bell, who merely identified a map of the vicinity of defendant's home; Perry W. Parker, a police officer who testified that he had arrested the defendant on June 1st, 1936, more than a year prior to the alleged crime, and Alfred Fraga, Police photographer, who identified the photographs of the dead body of Wah Choon Lee, the victim of the alleged crime.

The Territory of Hawaii then called as its witness Lou Rodgers, who testified on direct examination, that she lived at Wahiawa; that she knew the defendant and had known her for four years; that she was present in the home of the defendant on June 1st, 1936; that she was working as a prostitute in the home of the defendant; that she went to the Police Station with police officer Parker on June 2nd, 1936 and while at the Police Station she had a conversation with the defendant in which the defendant stated that she wanted to wire the building with electricity and wanted to know what she thought about it and how to fix the place up on account of burglars and drunken soldiers and that the defendant told her that the electric equipment would help to get rid of the cops or to keep them away; that she was present at a conversation between the defendant and John Kiehm and that the defendant, in her presence, asked John Kiehm if he could install the equipment if she got the wire and material;

That thereafter the defendant procured the material and that John Kiehm installed the apparatus to the front and back doors and that the switch was located on the stairway.

Again the witness described the electrical apparatus and stated that the wires ran to the front door and the back door and described and located the switch and that after the installation, John Kiehm came back and fixed the transformer, put a larger one in the second time. She further stated that the defendant had, on occasions, put electric current through the equipment by turning on the switch.

On cross-examination the witness testified that she lived with the defendant prior to April 1936, when she departed for the Mainland; that she returned from the Mainland on May 22, 1936, and lived with the defendant until August 4, 1937, when she moved out; that while residing with the defendant, the defendant's home had been robbed and they were bothered continuously by drunken soldiers; that the witness was the only one who had been involved with the police.

Further testifying on cross-examination, the witness stated that the first time she ever made any statement to the police was subsequent to the death of Wah Choon Lee and only when she was questioned by Captain Hays at the Police Station and at which time Captain Hays exhibited to her the electrical equipment seized in defendant's home, which evidence was suppressed, and that every question he asked was based upon the said electrical equipment; that her entire statement made to the police was based upon certain equipment that was in her presence and in answer to questions regarding it.

On redirect examination the witness testified that when the police had her at the station, shortly after the death of Wah Choon Lee, they had some electrical equipment there and that it was the same equipment that was in defendant's home when the witness resided there and stated that was how the police got the lead and that the police then questioned her as to what she knew personally about that equipment, how she knew it was in the house, how it was put in and all such things; and all that she told the police was based upon her memory and her own observation and not what she saw at the Police Station.

The defendant moved to strike the testimony of this witness, upon the ground that the evidence was obtained as a result of an illegal search and seizure, that the knowledge of the existence of the equipment was gained only through an illegal search and that the information obtained by the police was used to obtain the evidence from this witness, and in violation of the defendant's rights under the fourth and fifth Amendments to the Constitution.

The trial court denied the motion, and the defendant duly excepted, and the exception was noted. At the conclusion of the case of the Territory the motion was renewed upon the same grounds and again denied by the trial court, to which ruling the defendant again excepted.

The Territory then called as its witness, John Kiehm who testified on direct examination as follows:

That he was a resident of Wahiawa; that he was an automobile mechanic; that on July 11, 1936, the defendant came to his garage and asked if he could install some device on the door so that the person opening it would receive an electric shock; that he told her he could; that

later he purchased a transformer and had it installed; that there was one wire leading to the front door and one to the back; the main wire led to a switch on the door panel; that he did not recall if he put the switch in but he connected the wires to the switch; that the main wire was connected to the fuse plug and the fuse plug was connected to the ordinary wire; that the transformer was located above the living room door, one wire led from the transformer to the front door, one to the back door and one to the ground located outside the house; that he had a conversation with defendant after the apparatus was put in concerning the wiring and how to operate it; that he was an auto electrician and studied electricity.

The witness then proceeded to draw the floor plan of the home of the defendant, locating thereon the front door, the stairways, the electric switch, the transformer, the fuse plug, the manner in which the wires were connected to the front and back doors, the wires to the ground and he also drew a larger diagram showing the entire circuit, marking thereon the fuse plug, transformer and switch and connections to the switch; and then proceeded to describe the switch and testified that it was a knife type switch, double throw, with two wires leading to the transformer; and again drew a diagram representing the approximate size of the transformer.

Again, the witness testified as to the dimensions of the transformer; that it was about four and one-half inches wide by six inches long and about two or three inches thick; that the line running from the transformer to the ground outside was marked on the plan and was connected to a pipe; that one line ran from the transformer to the front and another line to the back door and that the

ransformer was located above the door; that the wire eading to the front door was soldered onto the front screen and approached the screen from the right upper corner inside the house about an inch above the hinge.

On cross-examination the witness testified that he made a statement to the police after the police officer was killed and that he signed a statement at the Police Station; that it was the first statement that he had made concerning the case; that at the time that the statement was made, the police exhibited to him certain electric equipment which consisted of a transformer, some wires and a switch and that they were the same articles that he had put into the house of the defendant.

The witness further testified that in 1936 the defendant drove up to the shop and asked him if he could install some kind of a device on the front door to keep away soldiers because they came at all hours of the night and pounded on the door; that he told the defendant he could and further told the defendant that a transformer would give a shock; and that the installation of a transformer and some wires would give a shock; that the defendant asked him if he would guarantee that it would not kill and that he told the defendant that the shock was not strong enough to harm a person and that the defendant then asked him to install the apparatus.

On redirect examination the witness testified that all of his evidence theretofore given was from his own memory of what happened and what he had put in the house, and was not influenced by what the police told him.

On recross examination the witness testified that the police showed him the equipment and asked him what he

knew about that equipment and then the witness started to tell his story.

The defendant then moved to strike the testimony of the witness upon the ground that it was based upon information procured during an invalid search and that the testimony tended to incriminate the defendant under the fifth amendment to the Constitution and was obtained in violation of the defendant's rights under the fourth Amendment of the Constitution, and also that the testimony was procured in violation of law. The motion was denied by the trial Court, and an exception was duly taken and noted to the ruling of the trial Court. The motion to strike was renewed at the conclusion of the Territory's case and again denied by the trial Court. An exception was duly taken and noted to the ruling of the Trial Court.

Prosecution's witnesses Lucy McGuire, a maid in the home of defendant, and James P. Michels, an employee of the Hawaiian Electric Company, Limited, gave testimony, not however, material to the issues raised by this appeal.

The Territory then called, as its witness, Edward J. Burns, and upon being duly sworn, testified as follows:

That he was a police officer, having joined the department on November 16, 1936, and worked as a foot patrolman; that on August 3, 1937, he was assigned to special duty with Captain Caminos at Wahiawa; that he was assigned by Captain Mookini to go with Captain Caminos to raid the house of the defendant; that he left Honolulu at 5:30 P.M., arrived at Wahiawa and left the Wahiawa Station at 8:45 P.M. in company with Captain Kalauli,

Captain Caminos, Officer Chun, Officer Apoliana and Officer Wah Choon Lee, the deceased.

The witness then testified that a group of seven officers left the Police Station at Wahiawa; that he separated from the group and went to defendant's place; that he wore a grey suit and black shoes and that all of the other officers were also in civilian clothes; that on reaching defendant's home he knocked on the wall next to the door; no one answered so he returned to the street; that he walked back and again knocked; that he saw a woman look out of a window and heard footsteps; the door was opened and he was let in by a woman, Billie Penland, who greeted him with a "hello"; that he followed her into the parlor and stopped by a wicker table where she asked a question, then he followed her into a room where there was a bed, dresser and washstand, and as she stood by, the witness took off his tie, started to remove his coat and then had a conversation as a result of which he gave the woman three dollars; that the woman took the three dollars and left the room and took with her a basin of water, when she returned he was undressing, she left and returned again when he had completed undressing; she went to the bed and removed her robe and sat on the bed; that he then reached for his clothes, took out a handkerchief, police badge and a whistle, blew the whistle three times, showed her the badge and told her she was under arrest for investigation; that he blew the whistle because that was a prearranged signal between Captain Caminos and his men and the witness that they were to raid the house; that the defendant came to the door after the whistle was blown and said, "what is the big idea of breaking into a respectable house this way?"

At the conclusion of the case for the Territory of Hawaii, the defendant moved to strike the testimony of this witness Burns upon the ground that it was procured in violation of the defendant's rights under the fourth and fifth Amendments to the Constitution of the United States, which motion was denied by the trial Court and to which ruling an exception was duly taken and noted.

The Territory then called as its next witness, Billie Florence Penland, and upon being duly sworn, testified as follows:

That she was acquainted with defendant and lived with her and was working for her as a prostitute on August 3, 1937, on which day there was a raid; that Officer Burns was there, that there was a knock at the front door, the defendant looked out of the window and told the witness to go down and let him in, saying it was okeh; that she went down and opened the door and let Officer Burns in; that they went to the reception room and then to another room; that the officer blew a police whistle and someone banged on the door; that the defendant came to the door; that she saw the defendant again on the front porch when there was a struggle with the officer, the defendant was there too; that she ran upstairs and later saw the defendant upstairs, when defendant told her to go into the closet and stay there; that there was an officer upstairs and that the defendant told her she turned the switch.

On cross-examination the witness testified that while she was held at the police station, the police showed her some wire, equipment, and a transformer and then they began to prod her and that she was hesitant about making any statement to the police because she wanted to protect the defendant until the wires, transformer and door were

shown to her and then they compelled her to tell what she knew about the door.

On redirect examination the witness stated that all she testified to was based upon her memory of what happened on the night of August 3, 1937.

Upon the completion of the testimony of this witness, the defendant moved to strike her testimony upon several grounds, among which was that the evidence was obtained in violation of the defendant's rights under the fourth and fifth amendments to the Constitution, which motion was denied and to which ruling an exception was duly taken and noted. The motion to strike was renewed at the close of the case for the Territory and again denied. An exception was duly taken and noted to the ruling of the Trial Court.

Witnesses for the Territory, Marjorie Scott, an occupant of the home of the defendant, Charles W. Erpelding and William L. Odle, Sergeants in the United States Army testified to matters not material to the issues raised by this appeal.

The Territory then called, as its witness, Clarence C. Caminos, who, upon being duly sworn, testified that he was Captain of the Vice Squad of the Honolulu Police Department; that on August 3, 1937, in company with seven officers he left the Police Station and went to the defendant's home; that he was in command; that he told the two officers stationed in back that the signal would be a blast of a whistle and that they were to guard the place; that the witness and the other officers were stationed in front and when the whistle blew, he ran to the front door of the house and kicked the door and noticed it opened out and so he told the other officers not to kick the door;

that Officer Wah Choon Lee then rushed the door and grabbed the metal part; that he heard a yell, saw the officer fall backward; that he turned and looked and saw the officer in the arms of Captain Kalauli and when he turned again the door was open and the defendant was standing there and Officer Burns was also standing there.

On cross-examination the witness testified that he went to Wahiawa to make a raid on the defendant's home, and that he was ordered to do so by the Chief of Police, without any search warrant; that he sent officer Burns into the house to try to make a case of prostitution, to go in and give three marked dollars, after which he was to make an arrest and then blow the police whistle; that he was not to have intercourse with anyone. The witness again stated that he told Officer Burns to go in and make a case and if he felt that an arrest should be made for some kind of violation, to place the people under arrest and to notify the officers outside by a blast of the whistle; that as he approached the front door he said, "Open up—police officers"; that about ten years before the defendant had been arrested for a liquor violation and that the only conviction was for the said liquor violation; that he knew of his own knowledge that defendant had never been convicted of running a house of ill fame; again the witness stated that his instructions to Burns was to get into the house and if he felt he had sufficient evidence, to make the arrest; then blow his whistle so that he and the other officers could arrest.

The Territory of Hawaii then called as its next witness, Francis Apoliona, who upon being duly sworn, testified as follows:

That he was a police officer on August 3, 1937; that, in

company with six other officers he went to raid "Speed" Warren's place; that he was stationed in the back of the house to cover anyone who left the premises; that he heard the police whistle and ran into the yard and stayed in back; that later he saw Wah Choon Lee in front of the house; that he picked Wah Choon Lee up and placed him in a car and took him to the hospital at Schofield Barracks.

The Territory of Hawaii then called as its witness, James S. Taylor, who upon being duly sworn, testified that he was a Captain in the Medical Corps; that on August 3, 1937, he examined the body of Wah Choon Lee and that he was dead.

The Territory of Hawaii then called as its witness, Kam Yuen, who upon being duly sworn, testified that he was a police officer; that on August 3, 1937, he was on special duty to go on the raid; that Captain Caminos was in charge; that he was with Captain Caminos in front of defendant's house; that when he got to the front door of defendant's house Captain Caminos announced they were police officers and asked "Speed" to open the door; that the door was being opened and that they heard a scuffling sound, and when the door opened the defendant was there; before the door opened, Captain Caminos said not to kick the door; that Officer Lee started to pull the door and that Lee let out a scream or yell and fell backwards into Captain Kalauli's arms; that Lee was standing on a metal mat; when the door opened, Captain Caminos ordered him to assist Officer Burns; that he went upstairs and saw the defendant there; that he was assigned to guard the premises.

On cross-examination, this witness testified that the offi-

cers went to defendant's house to raid; that when Burns was ready he was to give a signal—a blast of a whistle; that there was no fight between the defendant and Burns when the door opened; that he asked Burns if he needed help and he said no.

The Territory of Hawaii then called as its witness, David Liu, who upon being duly sworn, testified that he was a medical doctor and acting coroner's physician; that he performed an autopsy upon the body of Wah Choon Lee; that the only external injury was an evulsion of the skin on the right thumb, a loss of some skin; that he found the brain congested; the heart was contracted and revealed pertechial hemorrhages and the organs of the abdomen were congested; that from the autopsy he could not say what caused the death; that from the history of the case, he concluded that death was caused from electric shock.

The Territory of Hawaii then called as its witness, Levi Kalauli, who upon being duly sworn, testified that he was a Captain of Police, stationed at Wahiawa; that he knew the defendant for five years and was well acquainted with her; that on August 3, 1937, the police conducted a raid on the home of the defendant; that accompanying him were six other officers; that Captain Caminos, Officers Kam Yuen and Wah Choon Lee were on the Officer Burns knocked, the door was opened and he walked in; a few minutes later a police whistle blew, he ran to the door of the house, there was a little noise in the house, Officer Caminos called, " 'Speed' Warren open the door, we are police officers." Officer Caminos kicked the door followed by Officer Lee; Officer Lee reached for the top of the door, he started to yell, he was leaning back-

ward, finally he was released and he fell right into the witness' arms; that he dragged Wah Choon Lee away and worked on him; that he left for the station for his car; that he ran to the station and found one of his officers there and ordered him to take the car to the home of the defendant; that he then made his report; that he was not in command of the other officers and that the investigation was conducted by Captain Caminos; that he did not enter defendant's home.

On cross-examination the witness testified that the investigation was in charge of Captain Caminos; that there was a discussion before the raid and that the purpose was to raid "Speed" Warren's place; that they did not have a search warrant and that no discussion was had about a search warrant; that the instructions were to rush the place when the whistle blew.

The Territory of Hawaii then called as its witness, James S. Bunnell, who upon being duly sworn, testified that he was an electric meter engineer; that in his opinion a three way wire carrying a voltage of 115 volts was considered dangerous and that electricity at all voltages was dangerous.

The Territory then called as its witness, Robert B. Faus, who upon being duly sworn, testified that he was the City and County Physician and a medical doctor; that in his opinion, the deceased died from electrocution.

The Territory then called as its witness, Young Choon Lee, who upon being duly sworn, testified that he was a brother of Wah Choon Lee; that the said Wah Choon Lee was dead and that he last saw the deceased alive on August 3, 1937.

The Territory then concluded its case in chief.

Thereafter the defendant called as her witnesses Charles B. Dwight, Kenneth Young, Harry A. Wilder and Edward A. O'Connor, whose testimony is not material to the issues raised by this appeal.

Jacintho Paulos, a witness for the defendant testified that there was in the defendant's yard, a "No Tresspassing" sign which was clearly visible from the street.

Thereafter the Territory of Hawaii and the defendant offered certain proposed instructions. The Territory of Hawaii offered Prosecution's Requested Instruction No. 12, reading as follows:

> "You are instructed that Section 5404 of the Revised Laws of Hawaii 1935 provides as follows:
>
> > 'Policemen, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense.'
>
> "You are hereby instructed that the term 'reasonable suspicion' as used in said statute is construed by the Court to mean probable cause.
>
> "You should consider this law together with all the evidence in the case in determining whether or not the deceased, Wah Choon Lee, was lawfully upon the premises of the defendant at the time in question."

The defendant objected to the instruction upon the ground that the instruction violated the Fourth and Fifth Amendments to the Constitution of the United States in that the said section permitted arrests to be made in both

felonies and misdemeanors upon reasonable suspicion and that the said section makes no distinction of the right to make an arrest without a warrant in case of felonies and in case of misdemeanors; and that Section 5404 of the Revised Laws of Hawaii, 1935, being in contravention of the said Amendments to the Constitution, was null and void. The objections of the defendant were overruled and the objections were duly noted and upon the same having been given to the jury an exception was duly noted.

Thereafter the Territory offered Prosecution's Requested Instruction No. 12A reading as follows:

> "You are instructed that if you believe from all the evidence and beyond a reasonable doubt that the deceased was acting as a police officer and that he went upon the premises of the defendant for the purpose of assisting another police officer, and that the deceased in so doing acted under such circumstances as would justify a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to commit an offense against the laws of the Territory of Hawaii, then you must find under such circumstances that the deceased, Wah Choon Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased a trespasser."

to which offer the defendant objected upon the ground that the instruction violated the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States in that under said instruction, an arrest in a misdemeanor could be made upon probable cause and not only when committed in the presence of the arresting officer, which objection was duly noted and over-

ruled by the trial Court, the objections thereto being noted during the consideration of the instructions in chambers and upon the same being given to the jury an exception was duly noted in open Court.

Thereafter the Territory of Hawaii offered Prosecution's Requested Instruction No. 14, reading as follows:

> "You are instructed that if you believe from all the evidence and beyond a reasonable doubt that the deceased was acting as a police officer and that he went upon the premises of the defendant for the purpose of arresting and detaining for examination such persons as he might have found thereon, and that the deceased in so doing acted under such circumstances as would justify a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to commit an offense against the laws of the Territory of Hawaii, then you must find under such circumstances that the deceased, Wah Choon Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased as a trespasser.
>
> "And in this connection you are further instructed that the fact as to whether or not there was a 'No trespassing' sign upon the premises at the time, would not alter the right of the deceased, Wah Choon Lee, or the other police officers with him, to be upon the premises in question."

to which offer the defendant objected upon the ground that the instruction violated the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States upon the ground that it permits a police officer to enter a private home to make arrests upon suspicion alone, and to make an arrest in the case of a mis-

demeanor although the offense was not committed in the officer's presence, and that the jury was permitted to consider all of the evidence in the case not limiting the jury to such facts as may have been comprehended by the arresting officer, in determining the question of whether or not a legal arrest was about to be made, which objection was overruled by the Court and the objection noted during the consideration of the instructions in the chambers of the Court, and when the said instruction was given the jury, the defendant duly excepted.

Upon the same subject the defendant offered in evidence Defendant's Requested Instruction No. 16, reading as follows:

> "You are instructed that a police officer may arrest without a warrant one guilty of a misdemeanor only if the misdemeanor is committed in the officer's presence."

which instruction dealt with the legality of arrest and the manner of making the same which instruction was objected to by the Territory of Hawaii because it was in conflict with Section 5404 of the Revised Laws of Hawaii 1935, and which objection was sustained and the instruction refused by the Court, which objection and the action of the Court thereon was duly noted, in chambers, and an exception to the Court's ruling was duly noted in open Court.

Thereafter the defendant offered Defendant's Requested Instruction No. 18 upon the same subject and reading as follows:

> "You are instructed that to justify an arrest for a misdemeanor without warrant it must have been committed in the officer's presence, and it is so com-

> mitted, where he can by the exercise of his own senses detect it; but mere suspicion is not enough."

which instruction was objected to by the Territory of Hawaii upon the ground that the said instruction was in conflict with Section 5404 of the Revised Laws of Hawaii 1935, and which objection was sustained by the Court and the requested instruction refused, which objection and refusal by the Court was duly noted in chambers, and an exception to the Court's ruling was duly noted in open Court.

The jury after having deliberated for more than twenty-four hours returned to the Court room with their verdict which, omitting the title of the Court and cause, and signature, reads as follows:

> "WE THE JURY, in the above entitled cause, find the defendant GUILTY OF MANSLAUGHTER, Leniency Recommended."

Whereupon the defendant duly excepted to the verdict upon the ground that it was contrary to law, the evidence and the weight of the evidence, and the exception was noted.

SPECIFICATIONS OF ASSIGNED ERROR

The Appellant relies upon the following numbered assignment of errors; I and II appearing on page 9 of the record, III appearing on pages 10 to 13 of the record, IV appearing on pages 14 to 17 of the record, V appearing on pages 17 to 22 of the record, VI appearing on pages 22 to 24 of the record; VII appearing on pages 24 to 26 of the record; VIII appearing on pages 26 to 28 of the record; IX appearing on pages 28 to 30 of the record; X appearing on pages 30 to 31 of the record;

XI appearing on pages 31 to 33 of the record; XII appearing on pages 33 of the record and XIII appearing on pages 33 to 34 of the record.

ARGUMENT

The assignment of errors raises only two issues of law, the first involving the admissibility of the testimony of the witnesses for the Appellee, Edward J. Burns, Lou Rodgers, John Kiehm and Billie Florence Penland set forth in assignment of errors numbered III to VI inclusive and the second concerning the propriety of the trial Court in giving to the jury over objection and exception prosecution's requested instructions 12, 12-A and 14; and of the refusal of the Trial Court to give to the jury, Appellant's requested instructions numbered 16 and 18 as set forth in assignment of errors VII to XI inclusive.

The first issue involves the constitutional question of whether or not the appellant's rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated by the admission of the testimony of the said witnesses.

The second issue involves the question of the constitutionality of Section 5404 of the Revised Laws of Hawaii, 1935. If the admission of the evidence of the said witnesses violated Appellant's rights under the Constitution or if the said Section 5404 of the Revised Laws is unconstitutional then the assignments of error referred to above and the assignments of error numbered I, II, XII and XIII should be sustained by this Honorable Court.

III.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND FINDING THAT THE EVIDENCE OF EDWARD J. BURNS, A WITNESS FOR THE TERRITORY OF HAWAII,

CONCERNING HIS OBSERVATIONS IN THE HOME OF THE DEFENDANT, WAS COMPETENT AND ADMISSIBLE AND IN SUSTAINING THE RULING OF THE CIRCUIT COURT OVERRULING THE OBJECTIONS OF THE APPELLANT TO SAME AND IN DENYING APPELLANT'S MOTION TO STRIKE UPON THE GROUND THAT THE ENTRY INTO THE HOME OF APPELLANT WAS ILLEGAL AND VIOLATIVE OF THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION.

The witness Burns testified that he was a police officer and was assigned to raid the home of the Appellant (Rec. p. 239); that he was accompanied by six other officers; that he made the entry into the home alone and then proceeded to testify as to what he observed in the home of the Appellant, which testimony was allowed by the Court over the objection of the Appellant.

Captain Caminos, also a witness for the Territory, and in command of the police, testified that they went to Wahiawa to raid the home of Ilene Warren by order of the Chief of Police (Rec. p. 416) without any search warrant. Captain Levi Kalauli, Captain of the Wahiawa District, also testified that they were to raid the home of Appellant (Rec. p. 515).

The Appellant respectfully contends that the evidence adduced by Burns of his observations in the home after his entry without a warrant or other lawful process and without the consent of the Appellant, and even with Appellant's consent without disclosure of the character and purpose of the entry, was error and that by the admission of the evidence the Appellant's rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated.

The uncontroverted fact is that Officer Burns entered the premises of the Appellant for the purpose of gathering evidence against her (Rec. p. 240). Any information

he gathered as a result of that entry and search, concerning which information he testified to at the trial, was entirely inadmissible.

In *Gouled vs. U.S. 255 U.S. 298* the Supreme Court of the United States held:

> "That entry in to the private office of the defendant through stealth was in violation of the Fourth Amendment and evidence gained as a result of such entry was inadmissible."

In the Case of *Amos vs. U.S. 255 U.S. 313,* the Supreme Court of the United States again held:

> "That evidence obtained by a federal officer upon an illegal entry was inadmissible even though the entry was consented to by the wife of the defendant."

The Supreme Court of Hawaii in the Case of *Terr. vs. Ho Me 26 Haw. 331* held:

> "That entry into the defendant's home by a federal officer for the purpose of gathering evidence was illegal and the evidence obtained as a result thereof was inadmissible even though testified to by a witness who did not violate the search and seizure clause."

Finally in the case of *People vs. Dent* 19 N. E. (2) 1020 the Supreme Court of Illinois had before it a question similar to the one at the bar. In that case two police officers suspected the defendant of running a policy game and visited her home in July 1937. In response to their ringing the door bell someone in the house said "Come in." They entered, found defendant and a woman companion at a table in the dining room. On the table in open view, were the book numbers and slips; these the officers seized as evidence and arrested defendant. When the

officers stood at the door, the defendant could not see them. The identity of the police officers was not disclosed to defendant until they were in her presence. They did not have a search warrant.

In passing upon the question of the admissibility of the evidence that Court said, at page 1022:

> "Here the officers did not disclose their identity when seeking admission to the home of the defendant. Under the circumstances their actions were fraudulent and even if she had given them permission to enter in ignorance of their official character and purpose, such entrance would have been illegal."

It is clear from the evidence that Officer Burns was ordered to gain entry into appellant's home to gather evidence, and to gain such entry, through stealth he disguised himself in civilian clothes (Rec. 242) without disclosing the official character and purpose of the entry and was admitted by an occupant of the house, not the appellant, and which admission was not upon the invitation of appellant or occupant.

It is therefore respectfully submitted that the evidence of Officer Burns, objected to by Appellant, was incompetent, irrelevant and immaterial, that the admission thereof by the trial Court constituted reversible error, and that the Supreme Court of Hawaii erred in holding and finding that such evidence was competent and admissible and in sustaining the ruling of the trial Court.

IV.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND FINDING THAT THE EVIDENCE OF LOU RODGERS, A WITNESS FOR THE TERRITORY, THE KNOWLEDGE OF WHICH EVIDENCE, WAS GAINED BY THE POLICE AS A RESULT OF INFORMATION OBTAINED BY THE POLICE THROUGH AN ILLEGAL SEARCH AND SEIZURE, WAS COMPETENT AND ADMISSI-

BLE, AND THAT THE ADMISSION OF SAME DID NOT VIOLATE APPELLANT'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION AND IN SUSTAINING THE DENIAL BY THE TRIAL COURT, OF APPELLANT'S MOTION TO STRIKE UPON THE GROUND THAT THE TESTIMONY WAS OBTAINED AS A RESULT OF AN ILLEGAL SEARCH, THAT THE ADMISSION THEREOF INCRIMINATED APPELLANT UNDER THE FIFTH AMENDMENT AND VIOLATED APPELLANT'S RIGHTS UNDER THE CONSTITUTION AND THE FOURTH AND FIFTH AMENDMENTS THEREOF.

V.

THAT THE SUPREME COURT ERRED IN HOLDING AND FINDING THAT THE EVIDENCE OF JOHN KIEHM, A WITNESS FOR THE TERRITORY, CONCERNING THE ELECTRIC EQUIPMENT IN THE HOME OF THE DEFENDANT WAS COMPETENT, RELEVANT, MATERIAL AND ADMISSIBLE AND IN SUSTAINING THE CIRCUIT COURT'S RULINGS OVERRULING THE OBJECTION OF THE DEFENDANT AND DENYING DEFENDANT'S MOTION TO STRIKE UPON THE GROUND THAT THE SAME WAS BASED UPON INFORMATION PROCURED DURING AN INVALID SEARCH AND THEREFORE TENDED TO INCRIMINATE THE DEFENDANT UNDER THE FIFTH AMENDMENT AND WHICH EVIDENCE WAS OBTAINED IN VIOLATION OF DEFENDANT'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

VI.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND FINDING THAT THE EVIDENCE OF BILLIE FLORENCE PENLAND, TO THE EFFECT, THAT DEFENDANT PULLED THE SWITCH, WAS COMPETENT AND ADMISSIBLE AND IN SUSTAINING THE RULING OF THE CIRCUIT COURT IN DENYING DEFENDANT'S MOTION TO STRIKE, WHICH MOTION WAS BASED UPON THE GROUND THAT THE EVIDENCE WAS OBTAINED IN VIOLATION OF DEFENDANT'S RIGHTS UNDER THE CONSTITUTION.

The Assignments of Error immediately above involve but one issue of law and will therefore be combined for the purpose of argument.

These Assignments of Error concern the question of the admissibility of the evidence given by the witnesses, Rodgers, Kiehm and Penland concerning the electrical equipment in the home of the Defendant, which evidence was procured from the witnesses by the police after they had obtained knowledge of the existence of the equipment

through its seizure in the home of the Defendant, upon an illegal search and which equipment as evidence was ordered suppressed by the Court.

It is the respectful contention of the Defendant that the evidence was inadmissible and incompetent and that the admission of the testimony violated the Defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Assignment of Error No. IV involves the admissibility of the testimony of LOU RODGERS; No. V involves the admissibility of the testimony of the witness JOHN KIEHM and No. VI involves the admissibility of the testimony of the witness BILLIE FLORENCE PENLAND.

It will be remembered that the Trial Court held the entry by the officers into the Defendant's home to be illegal and ordered suppressed the evidence found therein, which evidence consisted, among other things, of the electrical equipment and which equipment was exhibited to the witnesses at the police station and upon which the police based their questions and thereby obtained the evidence adduced by the witnesses later in Court.

In regard to this matter the witness LOU RODGERS testified as follows:

"Q. The first time you ever gave any statement to the police authorities was subsequent to the death of Wah Choon Lee, isn't that correct, after that?
A. It was while Mrs. Warren was in jail. I don't know.
Q. It was after the death of Wah Choon Lee?
A. Yes.
Q. And you were questioned in the police station by Captain Hays?
A. Yes.

Q. And at that time Captain Hays exhibited to you certain electrical equipment?

A. Yes.

Q. And every question that he asked you was based upon that electrical equipment, wasn't it?

A. Yes."

Rec. p. 141–142

"Q. Now this entire statment, Miss Rodgers, that you made to the police was based upon certain equipment that was in your presence and they were questioning you about it, isn't that correct?

A. Yes."

Rec. p. 151

Miss Rodgers further testified as follows:

"Q. Miss Rodgers did you tell the police at the time you were questioned by them that it was Mr. Kiehm who put the equipment in?

A. I don't remember if I did.

Q. You don't remember?

A. Speaking or writing.

Q. Speaking or writing.

A. I don't remember because I came out of the show —one evening going to the show, an officer asked me if I knew. I said I didn't. He asked me if it was Kiehm. I said it was the garage man. At that time I did not know his last name; all I knew him by was John.

Q. In other words, they asked you who put the electrical equipment in; you said it was John?

A. I said it was the garage man.

Q. Then you said it was John.

A. Yes."

Rec. p. 157–158

The testimony of the witness John Kiehm pertaining to this issue is as follows:

"Q. Now, Mr. Kiehm, did you sign a statement at the police station when you made this statement?
A. I did.
Q. That was the first statement you made concerning this particular incident?
A. That is right.
Q. And at the time that that statement was made, did they show you certain electrical equipment at the police station?
A. Yes.
Q. That consisted of a transformer?
A. Yes.
Q. That consisted of some wires?
A. Yes.
Q. And that consisted also of a switch?
A. Yes.
Q. And they were the same articles that you testified here on direct examination that you put into the house?
A. Yes."

Rec. p. 190

On re-cross examination Mr. Kiehm further testified as follows:

"Q. Mr. Kiehm, you testified on cross-examination that the police showed you this equipment?
A. Yes.
Q. And asked what you knew about it, isn't that correct?
A. Yes.
Q. And then you started to tell them your story; isn't that what happened?"

Rec. p. 192

The witness BILLIE FLORENCE PENLAND testified concerning the issue raised by these Assignments of Error as follows:

"Q. And while you were held down at the police station did they show you any wire, equipment transformers and things like that?
A. Yes, sir.
Q. And they began to pump you?
A. Yes, sir.
Q. And you never talked until they showed you those things?
A. Well, I didn't intend to tell the truth for a while. Mrs. Warren had been very good to me, so I did want to protect her to a certain extent.
Q. So you did not say anything to the police until they flashed the electric wires, transformers and door?
A. Yes.
Q. And they compelled you to tell them what you knew about the door, is that correct?
A. Yes."

Rec. p. 337

It is apparent from the quoted testimony that the evidence concerning the electrical equipment was obtained through knowledge acquired from the evidence which was seized illegally.

The Fourth Amendment to the Constitution of the United States reads as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor shall any person * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Supreme Court of the United States, has on numerous occasions, said: "The Fourth and Fifth Amendments must be liberally construed in favor of the accused."

Weeks vs. U.S. 232 U.S. 383.58 L. Ed. 652.
Amos vs. U.S. 255 U.S. 313.
Gouled vs. U.S. 255 U.S. 298.

The Supreme Court of Hawaii has said concerning these Amendments:

"It would not be possible to add to the emphasis with which the Supreme Court in the above cases has declared the importance of keeping unimpaired the rights secured to the people by these two amendments."

Terr. v. Ho Me 26 H. 331. 335.

The Supreme Court of the United States in *Silverthorne Lumber Company vs. U.S. 251 U.S. 392. 64 L. Ed. 319* held that any evidence obtained through an illegal search, or any knowledge gained from such evidence, was inadmissible as violative of the Defendant's rights under the Fourth and Fifth Amendments.

In the Silverthorne Lumber Company case, the agents of the government illegally seized documents belonging to the Silverthorne Lumber Company and after having obtained knowledge of the fact of their existence and their

contents, attempted by subpoena to procure that evidence. The government contended in that case that:

> "Although the seizure was an outrage which the government now regrets, it may study the papers, before it returns them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act."

But the Supreme Court properly rejected that contention by saying that:

> "The essence of the provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

P. 321.

See also *Nardone vs. U.S. 84 L. Ed. 227 at 229.*

The most recent case on the subject is that of Nardone vs. United States. It was first decided by the Supreme Court in 302 U.S. 379, 82 Law. Ed. 314. The Third Circuit Court of Appeals was reversed because it sustained the trial Court's ruling admitting in evidence information obtained by tapping wires.

The case again reached the Circuit Court of Appeals upon a second conviction,—106 Fed. (2) 41. The main issue raised was whether the trial judge improperly refused to allow the accused to examine the prosecution as to the uses to which it had put the information unlawfully gained, that is, what part of the evidence introduced was indirectly procured as a result of tapping the wires. (See page 42 of the decision.)

The Circuit Court of Appeals said, in disposing of the question—

"Where evidence is obtained by means of an ordinary crime, the Court will not look beyond the character of the evidence itself and other evidence obtained as a result of the crime is not rendered inadmissible, the common law rule prevailing in such case."

The Supreme Court, however, again reversed the Circuit Court of Appeals and said:

"To forbid the direct use of methods thus characterized, but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'"

Nardone vs. U. S. 84 L. Ed. 227, 229 and in determining the question the Supreme Court said:

"Here as in the Silverthorne case, the facts improperly obtained do not 'become sacred and inaccessible.' If knowledge of them is gained from an independent source, they may be moved like any others, but the knowledge gained by the government's own wrong cannot be used by it 'simply because it is used derivatively.'"

P. 1229.

In the case at bar, because of the Constitutional objection, the electrical equipment and apparatus was ordered suppressed consistent with the law as set down by the Supreme Court. The Appellee, however, notwithstanding the decision, used the evidence and the knowledge gained therefrom, not in Court but for the purpose of extracting from other witnesses evidence concerning the equipment and proceeded to and did offer in evidence a full and complete description of the equipment.

The fact, that the testimony regarding the electrical equipment by these witnesses, was obtained by Appellee as a result of knowledge gained through an illegal search and seizure and derivative of it, is conclusively shown by the evidence. First, the electrical equipment seized was ordered suppressed, and second, although illegally seized, appellee proceeded to exhibit the same to these witnesses before their statements were taken. That fact is as clearly shown by the testimony of these witnesses hereinbefore quoted.

The Supreme Court of Hawaii did not have before it, at the time that it rendered its decision, the decision of the Supreme Court of the United States, in Nardone vs. U.S.

The decision in the Nardone case is entirely consistent with the decision of this Court in *Wiggin's vs. U.S. 64 Fed. (2d) 950.* In the Wiggin's case, the government agents obtained information from two sources, namely, the seizure of defendant's books from his office during his absence and the testimony of defendant's nurse. The nurse, prior to the seizure of defendant's books, had given the government the information concerning violations of law by the defendant, and upon the information obtained from the nurse and the information obtained from the seizure, the government obtained defendant's confession, the admissibility of which was questioned in the case.

This Court correctly held that the information of law violation by the defendant was obtained from an original source,—the nurse—and that therefore the trial Court did not commit error in admitting the same.

In the case at bar, the government had no knowledge of the existence of the electrical equipment until it was illegally seized. The witnesses did not inform the police,

prior to the seizure, of the existence of the equipment and did not make any statement until confronted with the equipment.

It is therefore respectfully submitted that the testimony of these witnesses was incompetent, irrelevant, immaterial and inadmissible, and, that the knowledge gained by the government's own wrong cannot be used by it directly or derivatively.

The Supreme Court of Hawaii erred in the manner and form as set forth in the above assignments of error.

VII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN GIVING TO THE JURY TERRITORY OF HAWAII REQUESTED INSTRUCTION NO. 12, AS FOLLOWS:

> "THE COURT: YOU ARE INSTRUCTED THAT SECTION 5404 OF THE REVISED LAWS 1935 PROVIDES AS FOLLOWS,
>
> > 'POLICEMEN, OR OTHER OFFICERS OF JUSTICE, IN ANY SEAPORT TOWN, EVEN IN CASES WHERE IT IS NOT CERTAIN THAT AN OFFENSE HAS BEEN COMMITTED, MAY, WITHOUT WARRANT, ARREST AND DETAIN FOR EXAMINATION SUCH PERSONS AS MAY BE FOUND UNDER SUCH CIRCUMSTANCES AS JUSTIFY A REASONABLE SUSPICION THAT THEY HAVE COMMITTED OR INTEND TO COMMIT AN OFFENSE. YOU ARE HEREBY INSTRUCTED THAT THE TERM 'REASONABLE SUSPICION' AS USED IN SAID STATUTE IS CONSTRUED BY THE COURT TO MEAN PROBABLE CAUSE. YOU SHOULD CONSIDER THIS LAW TOGETHER WITH ALL THE EVIDENCE IN THE CASE IN DETERMINING WHETHER OR NOT DECEASED, WAH CHOON LEE, WAS LAWFULLY UPON THE PREMISES OF THE DEFENDANT AT THE TIME IN QUESTION."

WHICH IS NOT THE LAW: THAT SECTION 5404 OF THE REVISED LAWS OF HAWAII 1935, IS NULL AND VOID, IN THAT IT CONTRAVENES ARTICLE FOUR OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THAT UNDER SAID SECTION, ARRESTS WITHOUT WARRANT IN MISDEMEANORS MAY BE MADE UPON PROBABLE CAUSE, WHEREAS UNDER THE CONSTITUTION ARRESTS MAY ONLY BE MADE IN THE CASE OF MISDEMEANORS WHERE THE OFFENSE IS COMMITTED IN THE PRESENCE OF THE ARRESTING OFFICER.

VIII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN INSTRUCTING THE JURY OVER THE OBJECTION AND EXCEPTION OF DEFENDANT, AS REQUESTED BY THE TERRITORY OF HAWAII, IN TERRITORY OF HAWAII'S REQUESTED INSTRUCTION NO. 12A, AS FOLLOWS:

> "YOU ARE INSTRUCTED THAT IF YOU BELIEVE FROM ALL THE EVIDENCE AND BEYOND A REASONABLE DOUBT THAT THE DECEASED WAS ACTING AS A POLICE OFFICER AND THAT HE WENT UPON THE PREMISES OF THE DEFENDANT FOR THE PURPOSE OF ASSISTING ANOTHER POLICE OFFICER, AND THAT THE DECEASED IN SO DOING ACTED UNDER SUCH CIRCUMSTANCES AS WOULD JUSTIFY A REASONABLE SUSPICION BASED UPON PROBABLE CAUSE THAT SOME PERSON OR PERSONS UPON THE PREMISES HAD COMMITTED OR INTENDED TO COMMIT AN OFFENSE AGAINST THE LAWS OF THE TERRITORY OF HAWAII, THEN YOU MUST FIND UNDER SUCH CIRCUMSTANCES THAT THE DECEASED, WAH CHOON LEE, HAD A LAWFUL RIGHT THERE AND IT WAS HIS DUTY TO ENTER UPON THE PREMISES OF THE DEFENDANT AND YOU MUST NOT UNDER SUCH CIRCUMSTANCES CONSIDER THE DECEASED AS A TRESPASSER."

TO THE GIVING OF THE INSTRUCTION ABOVE SET OUT, THE DEFENDANT OBJECTED, AND STATED HER REASONS THEREFOR ORALLY IN THE JUDGE'S CHAMBERS IN THE PRESENCE OF THE ASSISTANT PUBLIC PROSECUTOR, TO-WIT: THAT SAID INSTRUCTION WAS ERRONEOUS IN LAW: THAT IT CONTRAVENED THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT UNDER SAID INSTRUCTION AN ARREST WITHOUT WARRANT IN THE CASE OF A MISDEMEANOR COULD BE MADE UPON PROBABLE CAUSE EVEN THOUGH THE OFFENSE WAS COMMITTED IN THE PRESENCE OF THE ARRESTING OFFICER AND THAT SAID INSTRUCTION WAS PREJUDICIAL TO THE DEFENDANT, AND AT THE CONCLUSION OF THE CHARGE OF THE COURT, IN THE PRESENCE OF THE JURY, BEFORE THE JURY RETIRED, THE DEFENDANT DULY EXCEPTED.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN GIVING TO THE JURY THE ABOVE INSTRUCTION OVER THE OBJECTION OF THE DEFENDANT, FOR THE FOLLOWING REASONS:

1. THAT SAID INSTRUCTION IS NOT THE LAW, THAT THE INSTRUCTION PERMITS ARRESTS TO BE MADE IN MISDEMEANORS, WITHOUT WARRANT AND WITHOUT THE PRESENCE OF THE ARRESTING OFFICER AND THEREFORE CONFLICTS WITH ARTICLE IV OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

2. THAT SAID INSTRUCTION WAS HIGHLY PREJUDICIAL TO DEFENDANT IN THAT IT PERMITTED THE JURY TO DETERMINE

THE RIGHT TO MAKE AN ARREST UPON ALL FACTS AS MAY OR MAY NOT HAVE BEEN KNOWN TO THE ARRESTING OFFICER.

IX.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN INSTRUCTING THE JURY OVER THE OBJECTION AND EXCEPTION OF DEFENDANT, AS REQUESTED BY THE TERRITORY OF HAWAII, IN TERRITORY OF HAWAII'S REQUESTED INSTRUCTION NO. 14, AS FOLLOWS:

> "YOU ARE INSTRUCTED THAT IF YOU BELIEVE FROM ALL THE EVIDENCE AND BEYOND A REASONABLE DOUBT THAT THE DECEASED WAS ACTING AS A POLICE OFFICER AND THAT HE WENT UPON THE PREMISES OF THE DEFENDANT FOR THE PURPOSE OF ARRESTING AND DETAINING FOR EXAMINATION SUCH PERSONS AS HE MIGHT HAVE FOUND THEREON, AND THAT THE DECEASED IN SO DOING ACTED UNDER SUCH CIRCUMSTANCES AS WOULD JUSTIFY A REASONABLE SUSPICION BASED UPON PROBABLE CAUSE THAT SOME PERSON OR PERSONS UPON THE PREMISES HAD COMMITTED OR INTENDED TO COMMIT AN OFFENSE AGAINST THE LAWS OF THE TERRITORY OF HAWAII, THEN YOU MUST FIND UNDER SUCH CIRCUMSTANCES THAT THE DECEASED, WAH CHOON LEE, HAD A LAWFUL RIGHT THERE AND IT WAS HIS DUTY TO ENTER UPON THE PREMISES OF THE DEFENDANT AND YOU MUST NOT UNDER SUCH CIRCUMSTANCES CONSIDER THE DECEASED AS A TRESPASSER. AND IN THIS CONNECTION YOU ARE FURTHER INSTRUCTED THAT THE FACT AS TO WHETHER OR NOT THERE WAS A 'NO TRESPASSING' SIGN UPON THE PREMISES AT THE TIME, WOULD NOT ALTER THE RIGHT OF THE DECEASED, WAH CHOON LEE, OR THE OTHER POLICE OFFICERS WITH HIM, TO BE UPON THE PREMISES IN QUESTION."

TO THE GIVING OF THE INSTRUCTION ABOVE SET OUT, THE DEFENDANT OBJECTED, AND STATED HER REASONS THEREFOR ORALLY IN THE JUDGE'S CHAMBERS, IN THE PRESENCE OF THE ASSISTANT PUBLIC PROSECUTOR, TO-WIT: THAT SAID INSTRUCTION WAS ERRONEOUS IN LAW: THAT IT CONTRAVENED THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT UNDER SAID INSTRUCTION AN ARREST WITHOUT WARRANT IN THE CASE OF A MISDEMEANOR COULD BE MADE UPON PROBABLE CAUSE, EVEN THOUGH THE OFFENSE WAS NOT COMMITTED IN THE PRESENCE OF THE ARRESTING OFFICER AND THAT SAID INSTRUCTION WAS PREJUDICIAL TO THE DEFENDANT: AND AT THE CONCLUSION OF THE CHARGE OF THE COURT, IN THE PRESENCE OF THE JURY, BEFORE THE JURY RETIRED, THE DEFENDANT DULY EXCEPTED.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN

GIVING TO THE JURY THE ABOVE INSTRUCTION, FOR THE FOLLOWING REASONS:

1. THAT SAID INSTRUCTION IS NOT THE LAW, THAT THE INSTRUCTION PERMITS ARRESTS TO BE MADE IN MISDEMEANORS WITHOUT WARRANT AND WITHOUT THE PRESENCE OF THE ARRESTING OFFICER AND THEREFORE CONFLICTS WITH THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

2. THAT SAID INSTRUCTION WAS HIGHLY PREJUDICIAL TO DEFENDANT IN THAT IT PERMITTED THE JURY TO DETERMINE THE RIGHT TO MAKE AN ARREST UPON ALL THE EVIDENCE IN THE CASE AND NOT UPON SUCH FACTS AS MAY HAVE BEEN KNOWN TO THE ARRESTING OFFICER.

X.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S REFUSAL TO GIVE TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 16, UPON THE SUBJECT OF ARRESTS, AS FOLLOWS:

"YOU ARE INSTRUCTED THAT A POLICE OFFICER MAY ARREST WITHOUT A WARRANT ONE GUILTY OF A MISDEMEANOR ONLY IF THE MISDEMEANOR IS COMMITTED IN THE OFFICER'S PRESENCE."

THE TERRITORY OF HAWAII OBJECTED TO THE GIVING OF SAID INSTRUCTION UPON THE GROUND THAT IT CONFLICTED WITH SECTION 5404 OF THE REVISED LAWS OF HAWAII 1935, SET FORTH IN TERRITORY'S REQUESTED INSTRUCTION NO. 12.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S REFUSAL TO GIVE SAID INSTRUCTION FOR THE FOLLOWING REASONS:

1. THAT SAID INSTRUCTION PROPERLY STATES THE LAW OF ARRESTS AND IS CONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES, AND THAT SECTION 5404 OF THE REVISED LAWS OF HAWAII IS UNCONSTITUTIONAL AND VOID.

2. THAT THE REFUSAL TO GIVE SAID INSTRUCTION WAS HIGHLY PREJUDICIAL TO DEFENDANT IN THAT THE JURY WAS NOT PROPERLY INSTRUCTED UPON THE VITAL SUBJECT OF ARRESTS.

XI.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S REFUSAL TO GIVE TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 18, UPON THE SUBJECT OF ARRESTS, AS FOLLOWS:

"YOU ARE INSTRUCTED THAT TO JUSTIFY AN ARREST FOR A MISDEMEANOR WITHOUT WARRANT IT MUST HAVE BEEN COMMITTED IN THE OFFICER'S PRESENCE, AND IT IS SO

COMMITTED, WHERE HE CAN BY THE EXERCISE OF HIS OWN SENSES DETECT IT: BUT MERE SUSPICION IS NOT ENOUGH.''

THE TERRITORY OF HAWAII OBJECTED TO THE GIVING OF SAID INSTRUCTION UPON THE GROUND THAT IT CONFLICTED WITH SECTION 5404 OF THE REVISED LAWS OF HAWAII 1935, SET FORTH IN TERRITORY'S REQUESTED INSTRUCTION NO. 12.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S REFUSAL TO GIVE SAID INSTRUCTION FOR THE FOLLOWING REASONS:

1. THAT SAID INSTRUCTION PROPERLY STATES THE LAW OF ARRESTS AND IS CONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES AND THAT SECTION 5404 OF THE REVISED LAWS OF HAWAII, 1935, IS UNCONSTITUTIONAL AND VOID.

2. THAT THE REFUSAL TO GIVE SAID INSTRUCTION WAS HIGHLY PREJUDICIAL TO DEFENDANT IN THAT THE JURY WAS NOT PROPERLY INSTRUCTED UPON THE VITAL SUBJECT OF ARRESTS.

THAT AS TO ASSIGNMENT OF ERRORS NOS. VII TO XI INCLUSIVE, THE DEFENDANT AT THE CONCLUSION OF THE CHARGE OF THE COURT, IN THE PRESENCE OF THE JURY, BEFORE THE JURY RETIRED, EXCEPTED TO THE CIRCUIT COURT'S RULING AS FOLLOWS:

MR. DWIGHT: ''MAY IT PLEASE THE COURT AT THIS TIME MAY I EXCEPT TO THE GRANTING BY THE COURT OF ALL OF THE PROSECUTION'S REQUESTED INSTRUCTIONS UPON MY GENERAL OBJECTION?''

THE COURT: YOU MAY.

MR. DWIGHT: TO THE GRANTING OF PROSECUTION'S REQUESTED INSTRUCTIONS NOS. 3, 4, 5, 12, 12A, 13, 14 AND 17 OVER OBJECTION, AND THE REFUSAL OF THE COURT TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NUMBERED 1, 2, 3, 4, 8, 10, 13, 16, 18, 28, 30, 31, 32 AND 37.

THE COURT: EXCEPTION WILL BE NOTED. THE OBJECTIONS ARE ALREADY IN THE RECORD.''

(Tr. of Ev. pp. 564–565)

One of the major issues that the trial jury had to determine was the question of whether the deceased was lawfully upon the premises of appellant at the time he received the injury resulting in his death. This question was dependent upon the right of a police officer to make an arrest without warrant.

The record is devoid of any fact indicating that appel-

lant was committing any violation of law on her premises. The fact is that the Captain of the Raiding Party, Captain Caminos, knew that the defendant had violated the National Prohibition Act some ten years before the alleged crime, but had no knowledge of any violation of law at the time of the raid or at any period of time reasonably prior thereto.

His directions to officer Burns were to enter the home of the defendant and if he could make out a case of prostitution, to signal by giving three blasts upon a police whistle. Maintaining a house of ill fame under Section 6310 of the Revised Laws constitutes vagrancy and is a misdemeanor. Being a common prostitute is also under Section 6310 of the Revised Laws of Hawaii, a misdemeanor. Fornication and adultery under Sections 6241 and 6238 respectively, of the Revised Laws are also misdemeanors.

The giving by the trial Court of Territory of Hawaii's requested instructions Nos. 12, 12-A and 14 objected to by appellant, as being in conflict with the Fourth Amendment to the Constitution and refusal of the Court to give appellant's requested instructions, numbered 16 and 18 because they were in conflict with Section 5404 of the Revised Laws of Hawaii, directly raises the constitutional question. If said Section 5404 is in conflict with the Fourth Amendment, the trial Court erred in giving said instructions and in refusing to give appellant's requested instructions, which it is contended is consistent with the Fourth Amendment.

The Fourth Amendment to the Constitution of the United States prevents arrests excepting upon probable cause based upon facts and not upon suspicion in the case

of felonies and only when committeed in the presence of the officer in misdemeanors. The Fourth Amendment is a limitation upon the power of the Territorial Legislature.

"This clause stands as a limitation on the power of the Territorial Legislature."

Peacock vs. Pratt (C.C.A.) Haw. 1903 121 Fed. 772, 778.

The Fourth and Fifth Amendments are affirmations of common law principles;

U.S. vs. Tons of Coal 28 Fed. Case 16515.
Weeks vs. U.S. 232 U.S. 392.
Vachina vs. U.S. (C.C.A.) 283 Fed. 35.
Bachenberg vs. U.S. (C.C.A.) 283 Fed. 37.
U.S. vs. Solomon (1929) 33 Fed. (2) 193.

In *Vachine vs. U.S. Supra,* at page 36, this Court said;

"The Fourth Amendment to the Constitution which prohibits unreasonable searches and seizures is to be construed in conformity with the principles of the common law. At common law officers may arrest those who commit crimes in their presence and they may avert a crime in the process of commission in their presence, by arrest, and without a search warrant they may seize the instruments of the crime."

The statute makes no distinction between felonies and misdemeanors. It simply uses the word "Offense."

See *Ter. vs. Hoo Koon 22 Haw. 597. 602.*

The Fourth Amendment distinguishes between felonies and misdemeanors.

In the case of misdemeanors, arrests without warrant may be made only where the offense is committed in the

presence of the arresting officer. In the case of felonies arrests may be made upon probable cause.

Carroll vs. U.S. 267. U.S. 132.
Poldo vs. U.S. (9 C.C.A.) 55 Fed. (2) 866.
Bird vs. U.S. 4 Fed. (2) 881 (8 C.C.A.).
Baumboy vs. U.S. (9 C.C.A.) 24 Fed. (2) 512, 513.

The cases hereinbefore cited are conclusive upon this Court and it must therefore hold that under the Fourth Amendment arrests without warrant may be made in the case of misdemeanors only when the crime is committed in the Officer's presence, and, in the case of felonies arrests may be made upon probable cause, based upon facts.

As our Statute permits arrests without warrant upon probable cause in the case of misdemeanors, it contravenes the Fourth Amendment and is therefore null and void.

The Statute by its language permits arrests in both felonies and misdemeanors upon reasonable suspicion. This is also violative of the Constitution. No arrests may be made upon suspicion no matter how reasonable, in either felonies or misdemeanors.

"Mere suspicion is not enough."

Poldo vs. U.S. 55 Fed. (2) (9 C.C.A.) 512, 513.
Garske vs. U.S. 1 Fed. (2) 620.
Schultz vs. U.S. 3 Fed. Supp. 273.

"Unless such information is based on personal observation or perception it is hearsay."

Schultz vs. U.S. 3 Fed. Supp. 273.
U.S. vs. Tom You 1 Fed. Supp. 357.

Upon this latter ground, that no arrest may be made upon suspicion however reasonable, the Statute is in di-

rect violation of the Fourth Amendment and this Court should hold the same unconstitutional.

Additional reasons why the instructions given to the Court are in conflict with the Fourth Amendment are apparent from the instructions themselves.

Instruction 12, after quoting the statute, provides:

> "You should consider this law together *with all the evidence in the case* to determine whether or not the deceased . . . was lawfully on the premises of the defendant at the time in question."

The instruction permitted the jury to consider all of the facts, facts entirely unknown to the deceased, facts concerning incidents that occurred after he was dead, and, facts concerning incidents that involved evidence of prostitution in the house occurring more than a year before that he knew nothing of,—incidents which he knew nothing of, occurring in the house just prior to deceased's attempted entry,—all for the purpose of the determination by the jury if there was evidence (facts) indicating that a crime was being committed in Wah Choon Lee's presence. The only facts that could be considered were those observed by the deceased through his senses, and from no other source, therefore, in this regard the instruction was erroneous and in violation of the Fourth Amendment.

In Instruction 12a, the jury was instructed "that if they believe from *all* the evidence that the deceased went upon the premises to assist another . . . officer . . . under such circumstances as would justify a reasonable suspicion based on probable cause that some person on the premises had committed . . . an offense . . . then you must find that the deceased had a lawful right to be there. . . ."

Again the jury was permitted to determine the validity of the entry upon facts impossible of comprehension by the deceased at the time.

In Instruction 13, the jury was told that keeping a house for the purpose of prostitution was a crime that it was illegal to be a common prostitute without further defining the term, and that they could take these laws into consideration with all other evidence to determine whether Wah Choon Lee was legally on the premises, in other words, whether a crime had been committed in the presence of the officer.

In Instruction 14, the jury was told that if they believe from all the evidence, not evidence of facts comprehensible by Wah Choon Lee at the time, but all the evidence that the deceased went on the premises to make an arrest under such circumstances as would justify a reasonable suspicion based upon probable cause, that such entry was lawful.

The Supreme Court of Hawaii, in its decision, did hold that (Rec. p. 666)

> "While we believe that these instructions might well have been refused by the Court, the basis for such refusal would have been on the grounds not only that they were unsound in law but were excessively favorable to the defendant."

The lower Court further stated that the instructions were favorable because they conveyed the inference that if the deceased was a trespasser at the time he came to his death, the homicide was justifiable; that there was nothing in the record to support a finding that the deceased, at the time, intended to commit a felony; that the attending circumstances were wholly insufficient to justify a

belief of any such impending danger in the mind of a reasonable person." (Rec. p. 666–667.)

It is submitted that if the instructions were erroneous, and were objected to by Appellant, and an exception taken to the giving of the instructions, then the Supreme Court erred in sustaining the trial Court, regardless of whether the instructions were favorable or not, for the Supreme Court of the United States has said—

> "Of course in jury trials, erroneous rulings are presumptively injurious, especially those embodied instructions to the jury, and they furnish ground for reversal unless it affirmatively appears they were harmless."

> *Fillipan vs. Albion Vein Slate Co., 63 L. Ed. 853* at page 856.

In arriving at the conclusion that the instructions objected to by Appellant and Defendant's Instruction 34 (which was not before that Court upon any assignment of error), were favorable, and for that reason Appellant could not complain, the lower Court fell into the common error of picking out only portions of the Trial Court's charge and failing to consider the entire charge as well as the evidence.

An examination of the charge to the jury (Rec. p. 589–607) conclusively shows that the instructions were not favorable to the defendant.

Appellant's instruction No. 34, to which the Supreme Court of Hawaii was extremely critical was not before the Court upon any assignment of error. That instruction reads as follows:

> "You are instructed that a person in his own dwelling house may use such means as are necessary even to

the taking of life, to prevent a forcible and unlawful entry into his home." (Rec. p. 602.)

and the next paragraph of the Court's charge is as follows:

"To justify a homicide as in defense of habitation the accused must use no greater force than is necessary or apparently necessary to a reasonably prudent man. The force used by him must be neither greater in degree nor early or later in point of time than is necessary or apparently necessary."

Rec. p. 603

The two quoted paragraphs contain substantially the same principles of law as those set forth in the syllabus to the decision of the lower Court appearing on page 647 of the record.

There was also before the jury, considerable evidence of robberies and of annoyances from drunken soldiers.

The witness, LOU RODGERS, testified on direct examination, that the Appellant wanted to fix the home up on account of burglars and drunken soldiers (Rec. 87) that she had been robbed (Rec. p. 128) and reported it to the police but the police took finger-prints and did nothing else (Rec. p. 128); that they were disturbed on numerous occasions by drunken soldiers (Rec. p. 129) and that the electrical equipment was mostly for the protection of Appellant and Appellant's house (Rec. p. 130) that she used the equipment and received a shock (Rec. 140).

The witness, JOHN KIEHM, testified that the Appellant drove up with the witness Lou Rodgers and asked if the witness could install some kind of device to keep away soldiers (Rec. p. 190) because they came at all hours of the night and pounded on the door; that the

witness suggested the installation of a transformer that would give a shock; that the Appellant asked if the witness would guarantee that it would not kill and that he told her the shock was not strong enough to harm a person, whereupon the Appellant instructed the witness to install the apparatus (Rec. p. 191).

The witness, LUCY MCGUIRE testified that on a rainy night she received an electric shock when she touched the front door (Rec. p. 214).

There was ample evidence before the jury to warrant the Court giving the defendant's instruction thirty-four and there was evidence upon which the contention could be made that defendant's action in installing the equipment was reasonable, and necessary or apparently necessary for the protection of the Appellant's home against robberies and drunken soldiers, especially in view of the guaranty from the electrician Kiehm that the device could not harm anyone, a situation entirely different from the one suggested in the Supreme Court of Hawaii's decision concerning the installation of Spring guns.

In order for the jury to determine whether the action of Appellant in having the apparatus installed was reasonable, the question of whether or not the deceased was a trespasser became important and the Territory of Hawaii felt it necessary to have the jury instructed as set forth in the Instructions covered by this assignment of error. In fact, the main issue before the jury, was whether or not Appellant had the right to protect her habitation against robbers and drunken soldiers by installing the equipment.

The instructions, therefore, were unsound in law as found to be by the Supreme Court, and the error of the

trial Court was not harmless, but highly prejudicial. The Supreme Court of Hawaii therefore erred in the manner and form set forth in the foregoing Assignments of Error.

I.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN DISMISSING THE WRIT OF ERROR OF DEFENDANT FROM THE VERDICT, JUDGMENT AND SENTENCE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII AND IN SUSTAINING THE VERDICT, JUDGMENT AND SENTENCE OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, WHICH JUDGMENT OF THE SUPREME COURT WAS MADE AND ENTERED ON THE 20TH DAY OF OCTOBER, 1939, PURSUANT TO A DECISION MADE AND ENTERED ON THE 20TH DAY OF OCTOBER 1939.

II.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN DISMISSING THE DEFENDANT'S PETITION FOR A RE-HEARING IN THE SUPREME COURT, WHICH DECISION WAS RENDERED AND FILED ON NOVEMBER 25TH, 1939.

XII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE CIRCUIT COURT'S ACTION IN ACCEPTING THE VERDICT OF GUILTY OF MANSLAUGHTER, LENIENCY RECOMMENDED, FOR THE REASON THAT THE SAID VERDICT IS CONTRARY TO LAW, EVIDENCE AND WEIGHT OF THE EVIDENCE, TO WHICH RULING THE DEFENDANT DULY EXCEPTED, IN THE PRESENCE OF THE JURY AND BEFORE IT WAS DISMISSED AS FOLLOWS:

> "MR. DWIGHT: AT THIS TIME, MAY IT PLEASE THE COURT, MAY I EXCEPT UPON THE GROUND IT IS CONTRARY TO LAW, THE EVIDENCE, THE WEIGHT OF THE EVIDENCE, AND HEREBY GIVES NOTICE OF A MOTION FOR A NEW TRIAL."
> TRIAL."

XIII.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN SUSTAINING THE JUDGMENT AND SENTENCE OF THE CIRCUIT COURT UPON THE VERDICT FOR THE REASON THAT THE SAME IS CONTRARY TO LAW, UPON IMPOSITION OF WHICH SENTENCE THE DEFENDANT EXCEPTED AS FOLLOWS:

> "MR. DWIGHT: MAY THE DEFENDANT SAVE AN EXCEPTION TO THE SENTENCE UPON THE GROUND IT IS CONTRARY TO LAW."

Appellant in the foregoing assignments of error assign as error, the acceptance of the verdict of the Jury, the Judgment and sentence of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, the Judgment of the Supreme Court of Hawaii sustaining the Judgment and Sentence of the Circuit Court, and the Decision of the Supreme Court denying the petition for a re-hearing.

For the reasons fully stated in the argument in this brief upon assignment Errors III to VI and VII to XI inclusive, it is submitted that the Supreme Court of Hawaii erred in the manner and form as set forth in the foregoing assignments of error.

CONCLUSION

The issues raised by this appeal are novel to the Territory of Hawaii and whatever conclusion this Court may arrive at, will have a far reaching effect upon the people of the Territory of Hawaii and will settle the future policy of law enforcement and of the gathering and production of evidence in criminal trials.

The Appellant respectfully submits that to insure to the people of Hawaii and defendants in criminal trials, the rights guaranteed to them by the Constitution, that this Honorable Court must, for the reasons stated in this brief, hold that Appellant's rights under the Fourth and Fifth Amendments to the Constitution of the United States, were violated by the admission by the trial Court of the evidence objected to, by the giving to the jury of the instructions objected to, and by the refusal of the trial Court to give Appellant's requested instructions to the jury, all as set forth in the assignments of error herein.

The Judgment of the Supreme Court of the Territory of Hawaii must therefore be reversed.

Dated at Honolulu, Hawaii, this..........13..........day of September, A.D. 1940.

Respectfully submitted,

CHARLES B. DWIGHT
Attorney for Ilene Warren
alias Speed Warren
Appellant

APPENDIX

ASSIGNMENT OF ERROR III, IV, V, VI AND VII

III.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of Edward J. Burns, a witness for the Territory of Hawaii, concerning his observations in the home of the Defendant on the night of August 3, 1937, was competent and admissible and in sustaining the ruling of the Circuit Court overruling the objection of the Defendant and in denying the motion to strike, upon the ground that the entry into the home of Defendant was illegal and violative of the Fourth and Fifth Amendments to the Constitution and that the admission of said evidence violated Defendant's rights under the Fourth and Fifth Amendments to the Constitution.

In the Circuit Court, the witness, Edward J. Burns, upon being duly sworn, testified that he was a police officer [77] having joined the Department on November 16, 1936, and worked as a foot patrolman; that on August 3, 1937, he was assigned to special duty with Captain Caminos; thereupon the Defendant objected as follows:

"Mr. Dwight: May it please the Court, at this time I want to object to the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial; * * * upon the further ground that any evidence of this witness by observation in the house was illegal and in violation of the Fourth and Fifth Amendments of the Constitution.

The Court: The Court will overrule the objection.

Mr. Dwight: Save an exception.

The Court: The exception may be saved and noted."

(Tr. of Ev. p. 201.)

The witness then testified that he was assigned by Captain Mookini to go with Captain Caminos to raid the house of the Defendant; that he left Honolulu at 5:30 P.M., arrived at Wahiawa and left the Wahiawa Police Station at 8:45 P.M., in company with Captain Kalauli, Captain Caminos and four other officers. Thereupon the Defendant again objected as follows:

"Mr. Dwight: May I have an additional ground of objection, for the record, and that is that any evidence of this witness was secured without the consent of the defendant and in violation of her rights under the Constitution.

The Court: Objection overruled.

Mr. Dwight: Exception."

(Tr. of Ev. p. 202.)

The witness then testified that the group of seven officers left the station; that he separated from the group and [78] went to Defendant's place; that he wore a grey suit and black shoes and that all of the other officers were also in civilian clothes; that on reaching Defendant's home he knocked on the wall next to the door; no one answered so he returned to the street; that he walked back and again knocked; that he saw someone look out of a window and heard footsteps; the door was opened by a woman, Billie Penland; that he followed her into the parlor and stopped by a wicker table and she asked a question, then he followed her into a room, where there

was a bed, dresser and washstand, and as she stood by, the witness took off his tie, started to remove his coat and then had a conversation as a result of which he gave the woman three dollars; that the woman took the three dollars and left the room and took with her a basin of water, when she returned he was undressing, she left and returned again, when he had completed undressing, she went to the bed and removed her robe and sat on the bed; that he reached for his clothes, took out a handkerchief, police badge and whistle, blew the whistle three times, showed her the badge and told her she was under arrest for investigation; that he blew his whistle because that was a prearranged signal between Captain Caminos and his men and the witness that they were then to raid the house.

At the conclusion of the case in chief for the Territory of Hawaii the Defendant moved to strike the testimony as follows:

> "Mr. Dwight: At this time I move to strike the testimony of Officer Burns or so much thereof as occurred subsequent to the time that he testified the defendant asked what he meant by breaking into this house, to-wit, everything that he testified to subsequent to that point [79] when defendant entered the room downstairs upon the ground that the testimony is incompetent, irrelevant and immaterial; upon the ground that it was procured in violation of the defendant's rights under the Constitution, the Fourth and Fifth Amendments, and upon the further ground that at the time he was a trespasser upon the premises of the defendant in violation of the defendant's rights under the Constitution of the United States.

The Court: Motion denied.

Mr. Dwight: May I save an exception?

The Court: Exception noted."

(Tr. of Ev. pp. 501–502.)

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in overruling the objections of the Defendant and in denying Defendant's motion to strike for the following reasons:

(1) That the evidence was obtained as a result of an illegal entry and search of Defendant's home, without Defendant's consent, and in violation of the Defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States, and therefore, was incompetent and inadmissible.

(2) That the evidence was highly prejudicial to the Defendant and the overruling of Defendant's objections and denial of Defendant's motion to strike was prejudicial error.

IV.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of Lou Rodgers, a witness for the Territory concerning the electrical equipment in the home of the Defendant, was competent, relevant, material [80] and admissible; and in sustaining the denial by the First Circuit Court of Defendant's motion to strike upon the ground that the testimony was obtained as a result of an illegal search and that the admission thereof incriminated Defendant and violated Defendant's rights under the Constitution and the Fourth and Fifth Amendments thereof.

At the trial in the Circuit Court, the witness upon being

duly sworn testified that the Defendant procured the material and that John Kiehm installed the electrical apparatus in the home of the Defendant; that the wires ran from the front and back doors to the transformer; the witness also located the switch and drew a picture of the transformer.

On cross-examination the witness further testified that she was questioned at the police station by Captain Hays, who exhibited to her the electrical equipment seized in Defendant's home and that every question he asked was based upon the electrical equipment and that her entire statement to the police was based upon the equipment that was in her presence and in answer to questions regarding it.

On redirect examination the witness testified that when the police had her at the station shortly after the death of Wah Choon Lee, they had some electrical equipment there and that it was the same equipment that was in the home of the Defendant when she lived there; and stated that that was how the police got the lead and that the police then questioned her as to what she knew personally about the equipment, how she knew it was in the house, how it was put in and all such things; and that all she told the police was based upon her memory and her own observations and not what she saw at the police station. (Tr. of Ev. p. 112.) Thereupon the Defendant moved to strike [81] the testimony.

The motion to strike, the ruling of the Court thereon and the exception to the ruling are as follows:

> "Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it now affirmatively appears that the evidence the government

is now offering by virtue of placing this witness on the stand was obtained as the result of an illegal search and that this evidence tends to incriminate this defendant and violates her rights under the Fourth and Fifth Amendments to the Constitution." (Tr. of Ev. p. 119.)

"The Court: The Court is ready to rule. This evidence which Mr. Dwight asked to be stricken and excluded upon the ground that it is an invasion of the defendant's Constitutional rights under the Fourth and Fifth Amendments, in that he *argues is* based upon the evidence seized and the illegal search and seizure, is denied * * *

Mr. Dwight: May I suggest an exception?

The Court: You may."

(Tr. of Ev. p. 121.)

At the conclusion of the case in chief of the Territory of Hawaii the Defendant again moved to strike the testimony of this witness, as follows:

"Mr. Dwight: I move to strike the testimony of Lou Rodgers * * * upon the ground that any evidence that she may have given in this particular case was based entirely upon the electrical equipment * * * that was ordered suppressed by this Court and the further ground that her entire testimony was adduced at this trial from knowledge gained by the law officers * * * when they made an illegal and invalid search in contravention of [82] defendant's rights under the Constitution.

The Court: Motion denied.

Mr. Dwight: May I save an exception?

The Court: Exception noted."

(Tr. of Ev. pp. 502–503.)

That the Supreme Court of the Territory of Hawaii erred in sustaining the ruling of the Circuit Court denying the Defendant's motion to strike for the following reasons:

(1) That the evidence was obtained from an illegal source, to-wit, an illegal search and seizure, and the admission thereof was in violation of the Defendant's rights under the Constitution and the Fourth and Fifth Amendments thereof and therefore incompetent, irrelevant and immaterial.

(2) That the evidence was highly prejudicial to the Defendant and the denial of Defendant's motion to strike was prejudicial error.

V.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of John Kiehm, a witness for the Territory of Hawaii, concerning the electric equipment in the home of the Defendant was competent, relevant, material and admissible and in sustaining the Circuit Court's rulings overruling the objection of the Defendant and denying the Defendant's motion to strike the testimony, upon the ground that the same was based upon information procured during an invalid search and therefore tended to incriminate the Defendant under the Fifth Amendment and which evidence was obtained in violation of the Defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States. [83]

At the trial in the Circuit Court the witness upon being sworn testified that he was a resident of Wahiawa and an automobile mechanic; that the Defendant came to his garage and asked if he could install some device on the

door so that when a person opened it such person would receive an electric shock; that he told her he could and later purchased a transformer and installed it; that there was one wire leading to the front door and one to the back, the main wire led to a switch on the door panel; that he did not recall if he installed the switch but did connect the wires thereto; that the main wire was connected to the fuse plug and the fuse plug was connected to the ordinary wire; that the transformer was located above the living room door, one wire running to the front door, one to the back and one to the ground located outside the house; that he had a conversation with the Defendant after the apparatus was put in concerning the wiring and how to operate it; that he was an auto electrician and studied electricity.

The witness then proceeded to draw the floor plan of the home of the Defendant locating thereon the front door, the stairway, the electric switch, the transformer, the fuse plug, the manner in which the wires were connected to the front and back doors, the wires to the ground and also drew a large diagram showing the entire circuit marking thereon the fuse plug, transformer, switch and connections to the switch; and then described the switch as a knife type switch, double throw, with two wires leading to the transformer and then again drew a diagram representing the approximate size of the transformer, at which time the Defendant objected as follows: [84]

Mr. Dwight: May it please the Court, may I renew my objection? The further objection, that this witness is to reproduce evidence by an actual drawing of what this Court has suppressed. I object as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled. There is no showing but what this was entirely independent of any illegal search and seizure.

Mr. Dwight: Exception.

The Court: Exception noted."

(Tr. of Ev. p. 146.)

Thereupon the witness testified as to the dimensions of the transformer; that it was about four and one-half inches wide by six inches long and about three inches thick; that the line running from the transformer to the ground outside was marked on the plan, which wire was connected to a pipe; that the wire leading to the front door was soldered onto the front screen and approached the screen from the right upper corner inside the house about an inch above the hinge.

On cross-examination the witness testified that he made a statement to the police after the police officer was killed and that he signed a statement at the police station; that it was the first statement that he made concerning the case; that at the time the statement was made the police exhibited to him certain electrical equipment which consisted of a transformer, some wires and a switch and that they were the same articles that he put into the house of Defendant. (Tr. of Ev. p. 151.)

The witness further testified that in 1936 the Defendant drove up to the shop and asked him if he could install [85] some kind of a device on the front door to keep away soldiers because they came at all hours of the night and pounded on the door; that he told the defendant he could and further told the Defendant that a transformer would give a shock; that the Defendant asked him if he would guarantee that it would not kill and that he told

the Defendant that the shock was not strong enough to harm a person and that the Defendant then asked him to install the apparatus. (Tr. of Ev. p. 152.)

On redirect examination, the witness testified that all of his evidence theretofore given was from his memory of what happened and what he had put in the house and on recross-examination he testified that the police showed him the equipment and asked him what he knew about that equipment and then the witness began to tell his story. Whereupon the Defendant moved to strike the testimony as follows:

> "Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial; that it is based upon information procured during an invalid search and that this testimony tends to incriminate the defendant under the Fifth Amendment and was obtained in violation of the defendant's rights under the Fourth Amendment and also the further ground that the testimony was procured in violation of law."

(Tr. of Ev. p. 155.)

In a formal decision the Court denied the motion.
(Tr. of Ev. p. 163–166.)

> "Mr. Dwight: May I save an exception to the Court's rule?
>
> The Court: Exception saved and noted. [86]
>
> Mr. Dwight: On the grounds stated and I renew my objections all the way through including this witness your Honor on the same ground."

(Tr. of Ev. p. 166.)

That the Supreme Court of the Territory of Hawaii

erred in sustaining the rulings of the Circuit Court overruling the objection of the Defendant and denying the defendant's motion to strike for the following reasons:

(1) That the evidence was obtained from an illegal source, to-wit, an illegal search and seizure and the admission thereof was in violation of the Defendant's rights under the Constitution and the Fourth and Fifth Amendments thereof and therefore incompetent, irrelevant and immaterial.

(2) That the overruling of the objection of the Defendant and denial of the Defendant's motion to strike was prejudicial error.

VI.

That the Supreme Court of the Territory of Hawaii erred in holding and finding that the evidence of Billie Florence Penland, a witness for the Territory of Hawaii, to the effect that the Defendant told her that she pulled the switch, was competent and admissible and in sustaining the ruling of the Circuit Court in denying Defendant's motion to strike the testimony of the witness, which motion was based upon the ground that the evidence was produced and obtained in violation of Defendant's rights under the Fourth and Fifth Amendments to the Constitution.

In the Circuit Court the witness, Billie Florence Penland, upon being duly sworn, testified that she was acquainted with the Defendant and lived with her on [87] August 3, 1937, on which day there was a raid; that officer Burns was there; that they went to the reception room; that the officer blew a whistle and some one banged on the door; that the defendant came to the door; that she

saw the defendant again on the front porch when there was a struggle with the officer; that she ran upstairs and later saw the defendant upstairs when the defendant told her to go into the closet and stay there, and that the defendant told her she turned the switch.

On cross-examination the witness testified that while she was held at the police station, the police showed her some wire, equipment, and a transformer and then they began to pump her, and that she did not make any statement to the police until the wires, transformer and door was shown to her and then they compelled her to tell what she knew about the door.

On redirect examination the witness stated that all she testified to was based upon her memory of what happened on the night of August 3rd, 1937.

Upon completion of the testimony the Defendant moved to strike as follows:

> "Mr. Dwight: At this time I move to strike the testimony of this witness upon the ground that it is incompetent, irrelevant and immaterial. The evidence was produced and obtained in violation of defendant's rights under the Fourth and Fifth Amendments of the Constitution. * * *"

(Tr. of Ev. p. 316.)

The trial Court denied the motion and the exception was duly noted, as follows:

"The Court: The motion is denied." [88]

(Tr. of Ev. p. 316.)

Mr. Dwight: Save an exception.

The Court: Exception granted."

(Tr. of Ev. p. 317.)

That the Supreme Court of the Territory of Hawaii erred in sustaining the ruling of the Circuit Court, denying the Defendant's motion to strike for the following reasons:

(1) That the evidence was obtained and adduced as a result of an illegal search and seizure, and in violation of the Defendant's rights under the Constitution of the United States and the Fourth and Fifth Amendments thereto, and was therefore incompetent and inadmissible.

(2) That the evidence was highly prejudicial to the Defendant and the denial of the Defendant's motion to strike was prejudicial error.

VII.

That the Supreme Court of the Territory of Hawaii erred in sustaining the Circuit Court's action in instructing the jury over the objection and exception of Defendant, as requested by the Territory of Hawaii, in Territory of Hawaii's requested instruction No. 12, as follows:

"The Court: You are instructed that Section 5404 of the Revised Laws of Hawaii 1935 provides as follows:

'Policemen, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense.'

You are hereby instructed that the term 'reasonable suspicion' as used in said statute is construed by the [89] Court to mean probable cause.

You should consider this law together with all the evidence in the case in determining whether or not the deceased, Wah Choon Lee, was lawfully upon the premises of the defendant at the time in question."

To the giving of the instruction above set out, the Defendant objected, and stated her reasons therefor orally in the Judge's Chambers in the presence of the Assistant Public Prosecutor, to-wit, that Section 5404 of the Revised Laws of Hawaii 1935, incorporated in said instruction is unconstitutional and void in that under said section and instruction arrests without warrant may be made in either felony or misdemeanor upon probable cause irrespective of whether the crime was committed in the presence of the arresting officer or not; that under said section an arrest without warrant for an offense not committed in the presence of the arresting officer could be made in the case of a misdemeanor; that if any crime had been committed at the time of the entry of the officers in the home of Defendant it was a misdemeanor, and that therefore the said instruction contravened the Fourth Amendment to the Constitution of the United States; that said instruction permitted the jury to determine from all the evidence in the case, instead of only such facts as were cognizable by the officers at the time of entry, in determining whether a crime had been committed in their presence, and that the instruction was prejudicial to the rights of the defendant. At the conclusion of the charge of the Circuit Court, in the presence of the jury, before the jury retired, the Defendant duly excepted.

That the Supreme Court of the Territory of Hawaii [90] erred in sustaining the Circuit Court's action in giv-

ing to the jury the above instruction over the objections of the Defendant for the following reasons:

(1) That said instruction is not the law; that Section 5404 of the Revised Laws of Hawaii 1935, is null and void, in that it contravenes Article Four of the Amendments to the Constitution of the United States, in that under said section, arrests without warrant in misdemeanors may be made upon probable cause, whereas under the Constitution arrests may only be made in the case of misdemeanors where the offense is committed in the presence of the arresting officer.

(2) That said instruction was highly prejudicial to Defendant in that it permitted the jury to determine the legality of the arrest from all of the evidence and not from such facts as were cognizable only by the arresting officer.

(3) That said instruction was erroneous and the giving of which constituted reversible error.

DUE SERVICE AND RECEIPT OF A COPY OF THE WITHIN BRIEF IS HEREBY ADMITTED THIS 13 DAY OF SEPTEMBER, 1940.

/s/ Charles E. Cassidy

Public Prosecutor, City and County of Honolulu, Territory of Hawaii

No. 9506

United States
Circuit Court of Appeals
For the Ninth Circuit.

ILENE WARREN alias SPEED WARREN,
Appellant,

vs.

THE TERRITORY OF HAWAII,
Appellee.

Transcript of Record
In Three Volumes

VOLUME III
Pages 647 to 671

Upon Appeal from the Supreme Court of the Territory of Hawaii

FILED

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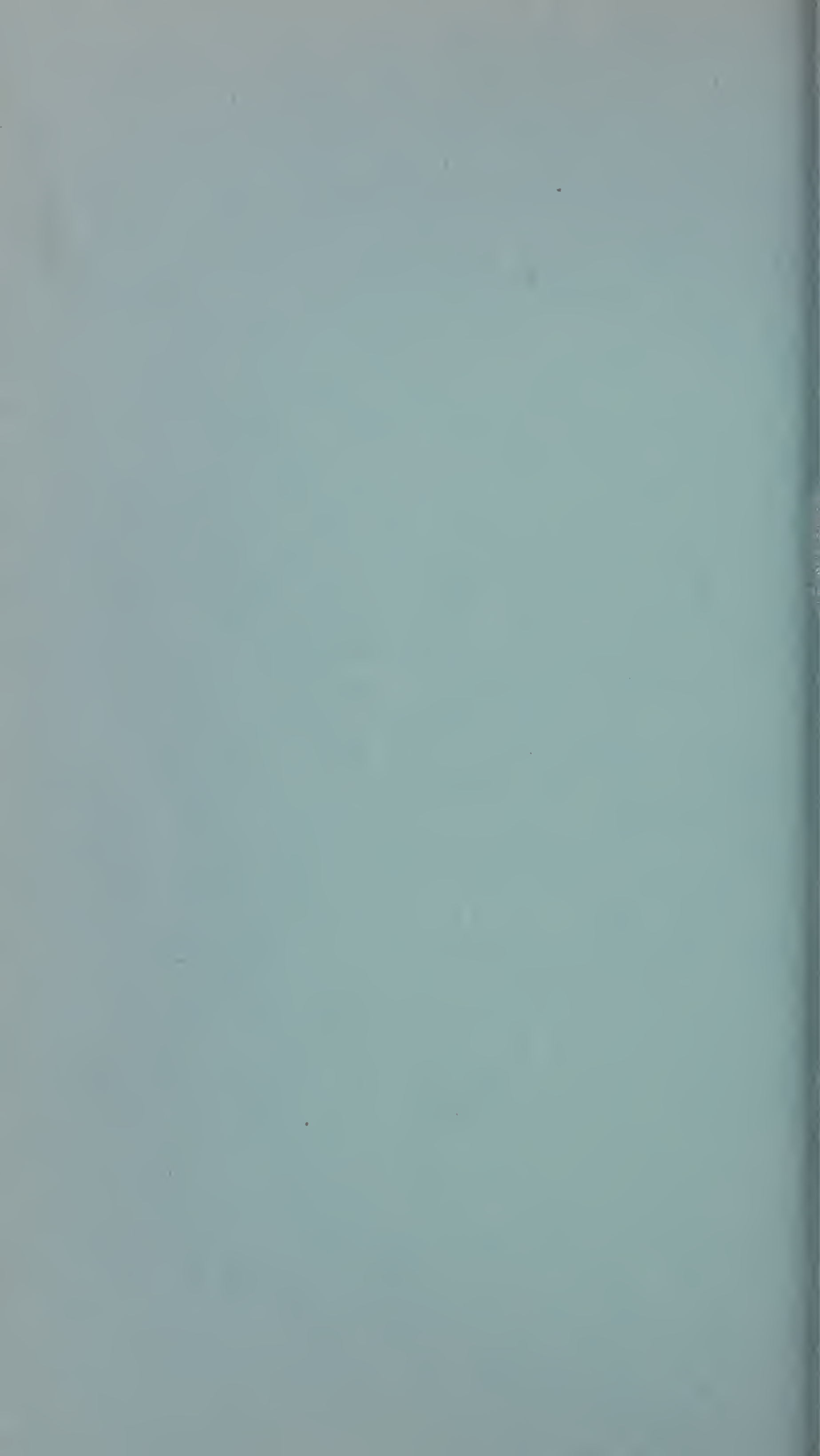

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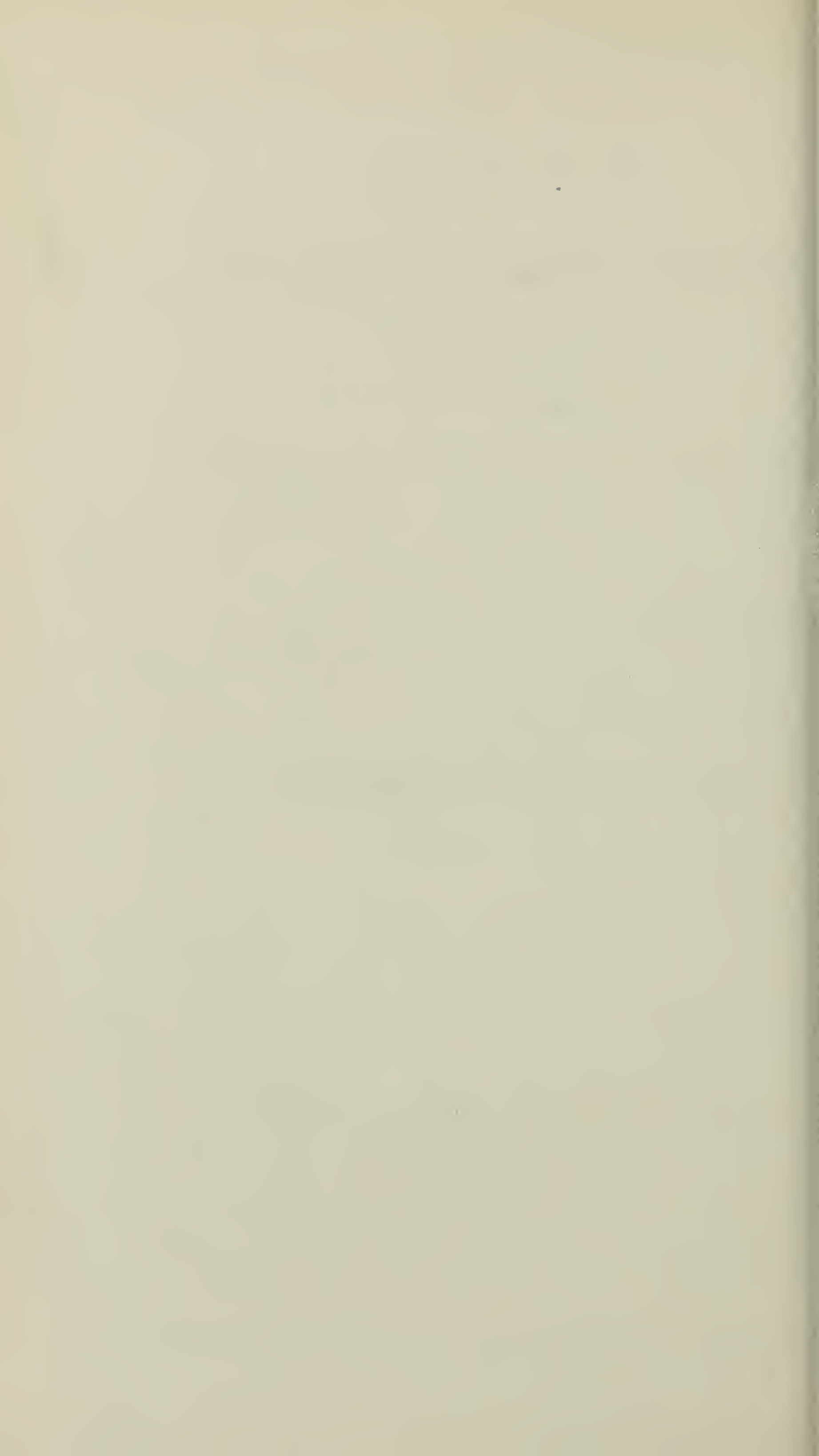


In the Supreme Court of the Territory of Hawaii.
October Term, 1939

No. 2376

THE TERRITORY OF HAWAII

v.

ILENE WARREN, alias "SPEED" WARREN

ERROR TO CIRCUIT COURT FIRST CIRCUIT

Hon. L. Le Baron, Judge.

Argued June 30, 1939 Decided October 20, 1939

Coke, C. J., Peters, J., and Circuit Judge Brooks in place of Kemp, J., Disqualified.

Homicide—character of defendant.

Where a defendant in a criminal case has not placed his character in issue the State is not permitted to introduce evidence to show bad character. It is not uncommon, however, in the trial of cases that in order to establish an important fact the character of a party may incidentally be impugned. This does not warrant the exclusion of the evidence.

Same—right to defend home.

The right of a person to defend his home does not license him to kill with impunity. The use of weapons or force dangerous to life and limb to evict a trespasser is privileged only if the actor reasonably believes that the threatened intru-

sion involves a danger to the life or limb of some inmate of his place or the commission of some other grave offense. [30]

Same—same.

The right of a person to use as much force as is necessary for the protection of his person and property is subject to the qualification that he shall not, except in extreme cases, endanger human life or do great bodily harm. A person may not kill because he cannot otherwise effect his object, although the object to be effected is right. He can only kill to save life or limb or to prevent a great crime or to accomplish a necessary public duty.

Appeal and Error—instructions.

An appellant cannot complain of instructions which are not prejudicial to him. [31]

OPINION OF THE COURT BY COKE, C. J.

Ilene Warren, alias "Speed" Warren, was indicted by the grand jury of the Territory of Hawaii on August 5, 1937, for the crime of murder in the second degree. The alleged crime arose out of the death of Wah Choon Lee, a police officer of the City and County of Honolulu, at the town of Wahiawa, on August 3, 1937. The defendant entered a plea of not guilty and a trial before a jury resulted in a verdict finding the accused guilty of the crime of manslaughter. Sentence was imposed accordingly.

The cause is now before this court upon a writ of error sued out by the defendant. Accompanying her application for the writ are 65 separate assignments of error.

At the time of the alleged crime and for more than a year prior thereto the defendant was engaged in conducting a house of ill fame on Muliwai street, Wahiawa, City and County of Honolulu. On or about June 1, 1936, the defendant had some difficulty with the police and following this incident she told one Lou Rodgers, an inmate of her house, that she intended to wire her house with electricity for the purpose of keeping drunken soldiers, burglars and the police away. At another time she expressed similar intentions to Lucy McGuire, a maid working in her establishment. Within a short time following these statements defendant engaged John Kiehm, a mechanic, to install a metal plate on the outside of the front door of the house and to connect it with an electric current with a capacity of 600 volts. This device, so installed at the direction of defendant, was controlled by a knife-type switch located inside of the [32] house adjacent to the front door. If the electric current was on at full voltage and a person, under the circumstances testified to in the case at bar, came in contact with it, at the same time making a ground thus completing the circuit, he would receive the full charge of electric current from the transformer and the voltage passing through his body would become imminently dangerous to life.

That the defendant was aware of the dangerous nature of the electric shock device which she had installed at the front door of her house is testified to by witness Penland, an inmate of the house, who related on the witness stand a conversation between herself and the defendant during which the defendant cautioned the witness never to touch the apparatus, stating that it was charged with 600 volts of electricity. The defendant further stated to the witness that the device was installed for the purpose of keeping drunks away and to be used "in case of a raid."

On the evening of August 3, 1937, between eight and nine o'clock, a group of police officers of the City and County of Honolulu, under the command of a captain of police, Clarence Caminos, arrived near the premises of the defendant. In this group of officers were E. J. Burns and the deceased, Wah Choon Lee. Officer Burns entered the defendant's house by invitation of Miss Penland, one of the inmates acting under the instructions of the defendant, the other police officers remaining near defendant's house on adjacent premises. The purpose of the presence of the police was to arrest any of the inmates of the defendant's house found committing a crime, and by [33] prearrangement, it was understood that in the event Officer Burns made an arrest and required assistance he would sound his police whistle and the officers stationed outside of the premises would enter and assist him. Within a short time after being let into the house of defendant

Officer Burns observed what he believed to be a commission of a crime by Billie Penland and attempted to place her under arrest. Meeting with resistance and interference by defendant, Burns sounded a call for help. The officers, under the command of Captain Caminos, advanced to the front door of defendant's house and upon hearing the noise of a scuffle within demanded admittance. There being no compliance, Wah Choon Lee reached to pull the door open and his hand came in contact with the metal plate on the front door. He at once fell backwards upon the ground and expired within a few minutes. A short time after the death of Wah Choon Lee the defendant admitted to witness Penland that she had pulled the electric switch. The evidence shows that Wah Choon Lee's death was caused by electrocution.

Manslaughter is defined as follows: "Whoever kills a human being without malice aforethought, and without authority, justification or extenuation by law, is guilty of the offense of manslaughter." R. L. H. 1935, §5996. Under an indictment for murder or manslaughter a jury may return a verdict of manslaughter as the facts proved may warrant. (See R. L. H. 1935, §5995.)

Defendant's assignments of error numbers 1, 2, 4, 6, 7, 10, 16 and 17 may properly be considered together. They complain of the action of the court in permitting the prosecution to introduce evidence which it is claimed reflected upon [34] the character and reputation of defendant in that it tended to

prove that prior to the commission of the crime alleged in the indictment she was engaged in operating a house of prostitution. Some of such evidence doubtless had that tendency. It is of course a well-recognized doctrine that where a defendant in a criminal case has not placed his character in issue the State is not permitted to introduce evidence to show a bad character. (See 30 C. J. 170.) Counsel for the Territory argued that this evidence was not introduced for the purpose of attacking the defendant's character and the evidence reflecting upon her reputation was merely incidental to other facts which were relevant and material. The trial court made it clear that the character of the defendant was not in issue and that the evidence complained of should not be considered by the jury as reflecting upon the defendant's past reputation. It is not uncommon in the trial of a case that in order to establish an important fact the character of a party may incidentally be impugned. This, however, does not warrant the exclusion of the evidence. Such seems to be the present case. About a year prior to the commission of the alleged crime the defendant had conceived the idea of electrifying her house (which at that time was a place of vice and ill fame) in order to protect her premises from raids by the police. She at that time made statements to others of her plans and purposes. In order therefore to prove these facts evidence that the defendant was at that time conducting a house of prostitution was brought out. The court instructed the jury that such testimony was for the purpose of fixing a time and place and

establishing motive on the part [35] of the defendant but should not be considered by the jury as putting in issue the character of the defendant. If, as it was claimed by the prosecution, the defendant, long before the day of the alleged crime and for the purpoes of forestalling police raids on her premises, caused the door leading into her building to be charged with sufficient electric voltage to cause death and by reason of this the deceased, Wah Choon Lee, was killed upon the night in question, it was proper for the prosecution to show these facts, although in divulging them to the jury the fact that defendant at that time was conducting a house of prostitution came to light. The reflection upon her character could not stand in the way of receiving the testimony if it had evidential value for other purposes. Evidence which is relevant is not rendered inadmissible because it proves or tends to prove another and distinct offense. (Johnston v. United States, 22 F. [2d] 1.) Professor Wigmore illustrates the rule in this fashion: "Suppose A to be charged with robbing the till in a store of which he is a sale-clerk; and suppose the facts to be offered against him (1) of having stolen the key of the till in the preceding week; (2) of having falsified his sale-book recently; (3) of having suffered large losses in gambling. From the point of view of the foregoing subject, these acts would all tend to show that he was of a dishonest and reckless disposition, and therefore disposed to steal from the till if opportunity offered. But from that point of view such acts would be

wholly inadmissible, either in proving the act charged in opening, or in rebutting his evidence of good character * * *. But that is not the only [36] possible point of view. These acts may be relevant in other ways to show the commission of the crime, without in any way employing or suggesting their inference as to his character. They may justify other inferences which go to show his doing of the act charged. Thus, the purloining of the key may found an inference of Design or Plan,—a plan to use the key in some unlawful way for obtaining access to the till; or it may show Knowledge,—knowledge of the whereabouts of the till and of its valuable contents. So the falsification of his sale-book may show a Motive,—the desire to prevent his larcenies from being discovered; or it may show Design,—a general design to obtain money from his employers unlawfully. So the gambling losses may show Motive in another way,—the need and desire of money at any cost, to pay his losses. Whatever tended ordinarily to show such Knowledge or Design or Motive would otherwise have been admissible; and these acts are merely instances, from a variety of evidence, of classes of facts which would be evidential for their respective purposes." 1 Wigmore, Evidence (2d ed.), pp. 456, 457.

The proper practice in cases of this kind was well-stated by Mr. Justice Brewer (afterwards a distinguished associate justice of the supreme court of the United States) in The State v. Adams, 20 Kan. 311, 319, where he said: "It is clear, that the

commission of one offense cannot be proven on the trial of a party for another, merely for the purpose of inducing the jury to believe that he is guilty of the latter, because he committed the former. You cannot prejudice a defendant before a jury by proof of general bad character, or particular acts [37] of crime other than the one for which he is being tried. And on the other hand, it is equally clear, that whatever testimony tends directly to show the defendant guilty of the crime charged, is competent, although it also tends to show him guilty of another and distinct offense. * * * A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him. A man may commit half a dozen distinct crimes, and the same facts, or some of them, may tend directly to prove his guilt of all; and on the trial for any one of such crimes it is no objection to the competency of such facts, as testimony, that they also tend to prove his guilt of the others." (See also People v. Thau, 219 N. Y. 39, 113 N. E. 556.)

Assignments of error numbers 13, 14 and 15 are wholly without merit. They question the ruling of the court permitting Officer Burns to give evidence of what he saw, heard and did in the house of the defendant in her presence at or about the time of the death of Wah Choon Lee. We find no basis for defendant's assertion that Officer Burns entered her home unlawfully and that his evidence thus became inadmissible. This subject will again be adverted to under assignment of error number 29.

Assignment of error number 16 challenges the ruling of the court permitting the introduction of the evidence of Billie Penland, an inmate of defendant's house, to the effect that on the evening of the commission of the alleged crime the defendant was operating a house of ill fame. This testimony, as well as that of Officer Burns, referred to in the preceding paragraph, was a part of the res gestae and was competent and material. [38]

Assignment of error number 29 involves the denial of defendant's motion to strike from the record the testimony of Officer Burns relating what happened in the house of the defendant. The Basis of the motion is that the witness was a trespasser upon the premises of defendant in violation of her rights under the Federal Constitution. It is settled law that evidence obtained by an officer as the result of an illegal entry into the premises of another is inadmissible and violative of the fourth Amendment to the Constitution. (See Gouled v. United States, 255 U. S. 298; Amos v. United States, 255 U. S. 313; Ter. v. Ho Me, 26 Haw. 331.) In the present case had Officer Burns obtained the information to which he testified in violation of the search and seizure clause of the Constitution the same, of course, should have been excluded but the evidence of both Officer Burns and the witness Penland was to the effect that Burns not only did not enter the premises by force or stealth or other unlawful manner but was voluntarily admitted into the building by Miss Penland at the direction of the defendant. The

officer was therefore lawfully within the building and it was competent for him to testify not only to what occurred but to what he had observed therein. (See Johnstone v. United States, 1 F. [2d] 928; Blanchard v. United States, 40 F. [2d] 904; United States v. Smith, 43 F. [2d] 173.)

A case in point is Marshall v. City of Newport, 200 Ky. 663, 255 S. W. 259. In that case, similar to the one at bar, police officers had entered the house of defendant and discovered evidence indicating that defendant was maintaining a house of prostitution. It was urged that this evidence was [39] incompetent because the officers had entered the house without a warrant or authority of law. Passing upon the point, the court said: "The officers had no search warrant, and admittedly no offense was committed in their presence, but their evidence shows, and it is not contradicted by appellant, that the entry into and examination of the house was with the consent of appellant. In these circumstances the testimony was competent."

Assignments of error numbers 5, 8, 9 and 18 challenge the rulings of the trial court permitting witnesses Rodgers, Kiehm and Scott to describe the electrical equipment previously installed in the house of defendant and which had been suppressed by order of the court. These assignments lack clarity but by reference to the transcript it appears that these witnesses, in giving their testimony, made reference to the equipment which had been suppressed by the court. They stated, however, that

their testimony was based upon their respective individual knowledge of the appearance of the equipment gained independently of the illegal seizure of it. Defendant relies upon the decision in Silverthorne Lumber Co. v. United States, 251 U. S. 385. In that case the court pointed out that information which was obtained through an illegal search and seizure was incompetent and inadmissible. But the court went on to say: "This does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." The trial court found that the electrical equipment had been illegally seized by the government officers [40] and ordered it suppressed and returned to the defendant. This, however, did not render incompetent the evidence of witnesses whose knowledge of the facts to which they testified came from an independent source, wholly apart from any knowledge gained by observation of the equipment subsequent to the illegal seizure. (See Cohen v. United States, 36 F. [2d] 461; Wiggins v. United States, 64 F. [2d] 950.)

Assignments of error numbers 20 and 23 fail to comply with requirements of rule 3 (b), as amended in 1938, which provides: "When the error alleged is to the admission or to the rejection of evidence the specification shall state the substance of the evidence admitted or rejected." In both instances

the court overruled objections to questions propounded to witness Caminos by the prosecuting attorney. But neither of the assignments indicates what, if any, evidence was admitted or rejected by the court. This plain violation of the rule precludes us from considering the questions attempted to be raised by defendant under these assignments. (Terr. v. Young, 32 Haw. 539; Houston v. Southwestern Tel. Co., 259 U. S. 318.)

Assignment of error number 24 brings up for review the ruling of the trial court which permitted Officer Caminos to testify to what he though when he heard the police whistle sounded by Officer Burns within the defendant's house at the time Burns, as he testified, was endeavoring to place the Penland woman under arrest. This evidence was offered by the prosecution for the purpose of justifying the entry of Caminos into the premises of defendant. Usually the impressions formed in the humand mind—in other words what a person may think—[41] as distinguished from evidence of what he may have done, is inadmissible, although there are exceptions to this doctrine. It is the modern rule that, where material and relevant to the issue, a party may testify directly as to his motive, intent or belief. (See 2 Jones, Evidence [2d ed.] §708.) "The condition of a man's mind with reference to what he thinks, feels, believes, intends, and his motives, is always a fact, and it is a fact which is often required to be ascertained both in civil and in criminal cases." Gardom v. Woodward, 44 Kan.

758, 25 Pac. 199. If, in the case at bar, it is proper to hold that the result of a mental process of witness Caminos was, under the circumstances, incompetent, the failure to exclude the testimony was in no way prejudicial to the defendant. This testimony added nothing to the case of the prosecution nor did it have any bearing upon the guilt of the accused. Officer Burns testified that after having made the arrest he sounded his police whistle as a signal to call Caminos to his assistance, in accordance with their prearranged plan. That Caminos, upon hearing the whistle, believed that an arrest had been made and that the officer required help, may, and perhaps did, cause Caminos to go to the aid of Burns but from our view of the case the motives of Caminos shed no light upon the issue in the case and while this evidence might well have been excluded its introduction was entirely innocuous.

Defendant's assignments of error numbers 41, 42 and 43 relate to the same general subject and will be consolidated. They complain of the giving by the court of the prosecution's instructions numbers 12, 12 A and 14. The [42] prosecution's instruction number 12, as modified by the court, reads as follows: "You are instructed that Section 5404 of the Revised Laws of Hawaii 1935 provides as follows: 'Policemen, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such

persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense.' You are hereby instructed that the term 'reasonable suspicion' as used in said statute is construed by the Court to mean probable cause. You should consider this law together with all the evidence in the case in determining whether or not the deceased, Wah Choon Lee, was lawfully upon the premises of the defendant at the time in question." Instruction number 12 A reads: "You are instructed that if you believe from all the evidence and beyond a reasonable doubt that the deceased was acting as a police officer and that he went upon the premises of the defendant for the purpose of assisting another police officer, and that the deceased in so doing acted under such circumstances as would justify a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to commit an offense against the laws of the Territory of Hawaii, then you must find under such circumstances that the deceased, Wah Choon Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased as a trespasser." Instruction number 14 reads: "You are [43] instructed that if you believe from all the evidence and beyond a reasonable doubt that the deceased was acting as a police officer and that he went upon the premises of the defendant

for the purpose of arresting and detaining for examination such persons as he might have found thereon, and that the deceased in so doing acted under such circumstances as would justify a reasonable suspicion based upon probable cause that some person or persons upon the premises had committed or intended to commit an offense against the laws of the Territory of Hawaii, then you must find under such circumstances that the deceased, Wah Choon Lee, had a lawful right there and it was his duty to enter upon the premises of the defendant and you must not under such circumstances consider the deceased as a trespasser. And in this connection you are further instructed that the fact as to whether or not there was a 'no trespassing' sign upon the premises at the time, would not alter the right of the deceased, Wah Choon Lee, or the other police officers with him, to be upon the premises in question." The court also gave defendant's instruction number 34, as follows: "You are instructed that a person in his own dwelling house may use such means as are necessary even to the taking of life, to prevent a forcible and unlawful entry into his home."

Due, apparently, to a misconception of the law applicable to the case, the court and counsel proceeded upon the theory that if the deceased was a trespasser upon the premises of the defendant on the evening in qustion the [44] defendant was justified in taking his life by means of the deadly instrumen-

tality which she had caused to be placed and maintained at the entrance to her house and this misconception accounts for the giving of these four erroneous instructions. The recognized rule is that "A person is not justified or excused in placing spring guns or other like instruments of destruction for the protection of his property where he would not be justified in taking life with his own hands for its protection or for the protection of his life or person, as in the case of mere trespass. But where he would have a right to slay another who is endeavoring with force and violence to commit a felony on the property, a killing committed by means of such instrument would likewise be justifiable." 30 C. J. 86, 87.

No case parallel to the present one has previously had the attention of the courts of this Territory although in other jurisdictions prosecutions for homicide involving similar facts are not uncommon. Most frequently, however, these are instances where death was caused by the discharge of a spring gun so placed and equipped that it would be discharged in the direction of an intruder attempting to open a door, window or gate or by his coming in contact with a wire stretched across a passage or pathway. But the underlying general principles of law apply to all similar cases regardless of the type of instrument of destruction employed. In State v. Beckham, 306 Mo. 566, 267 S. W. 817, the defendant set a spring gun to protect his soft drink stand which con-

tained property of small value and was held guilty of manslaughter for the death [45] of a youthful burglar. This case and The State v. Countryman, 57 Kan. 815, 48 Pac. 137; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200; State v. Plumlee, 177 La. 687, 149 So. 425, and many other decisions, support the doctrine that the right of a person to defend his home does not license him to kill with impunity. The use of weapons or force dangerous to life and limb to evict a trespasser is privileged only if the actor reasonably believes that the threatened intrusion involves a danger to the life or limb of some inmate of the place or the commission of some other grave offense. Bray v. State, 16 Ala. App. 433, 434, 78 So. 463, was a case where the deceased, a trespasser, had forcibly entered defendant's home in the nighttime and it was held that this alone would not justify the taking of his life, the court saying: "The deceased was a trespasser when he entered the defendant's habitation forcibly and against defendant's objection, but this fact in itself could not justify the taking of his life. Unless deceased was killed in the act of committing a felony, to justify the defendant in taking his life, it must be shown that the defendant or some member of his household was placed in impending danger of suffering death or serious bodily harm, or that the circumstances were such as to impress a reasonable man with the belief of such impending danger, and if without such danger the defendant committed a murderous assault on the

deceased, using more force than was necessary to eject him from the defendant's place of habitation, or save himself or those of his household from such peril and thus caused the death of the deceased, the defendant would not be guiltless." (See also 1 Bishop New Crim. L. §§839, 841, 850.) This [46] branch of the law of homicide is made the subject of interesting and useful articles appearing in 35 Yale L. J. 525-547 and in 9 Col. L. Rev. 720-722.

While it is often said that a person may rightfully use as much force as is necessary for the protection of his person and property, it should always be borne in mind that this rule is subject to this most important qualification—that he shall not, except in extreme cases, endanger human life or do great bodily harm. It is not every right of person, and still less of property, that can lawfully be asserted or every wrong that may rightfully be redressed by extreme remedies. There is a reckless—a wanton—disregard of humanity and social duty in taking or endeavoring to take the life of a fellow being in order to save oneself from a comparatively slight wrong. A person may not kill because he cannot otherwise effect his object, although the object to be effected is right. He can only kill to save life or limb or prevent a great crime or to accomplish a necessary public duty.

Defendant argues at length that section 5404, R. L. H. 1935, contravenes the provisions of the fourth amendment to the Federal Constitution be-

cause it permits the arrest of a person accused of a misdemeanor, even though the offense had not been committed in the presence of the arresting officer, citing Poldo v. United States, 55 F. (2d) 866, and other decisions of the federal court.

Based upon this assumption of the unconstitutionality of the local statute the defendant concludes that it was error to give to the jury the prosecution's instructions [47] numbers 12, 12 A and 14, as modified by the court. While we believe that these instructions might well have been refused by the court, the basis for such refusal would have been on the grounds not only that they were unsound in law but were excessively favorable to defendant. The same may be said of defendant's instruction number 34. These four instructions conveyed the plain inference that if the deceased, Wah Choon Lee, was a trespasser upon the premises of defendant at the time he came to his death the homicide was justifiable. As already indicated, the law does not sustain any such theory. There is nothing in the record in this case which could, in the remotest degree, support a finding that the deceased, when he approached the door of defendant's house on the night of the tragedy, intended to commit a felony or that the defendant, or any member of her household, was placed in impending danger of suffering death or serious injury. The attending circumstances were wholly insufficient to justify a belief of any such impending danger in

the mind of a reasonable person. Indeed the defendant made no claim at the trial that she apprehended any danger because of the presence of the deceased or any of the other police officers. The record clearly indicates that the deceased was not a criminal or felonious intruder but that he entered upon the premises of the defendant solely for the purpose of assisting a fellow officer who had made an arrest and had called for help. The constitutionality of section 5404, R. L. H. 1935, was not in issue and that question should not have been injected into the case. While prosecution's instructions numbers 12, 12 A and 14 might well have been refused by the [48] court, their effect was to accord the defendant an advantage to which she was not entitled. But of this she cannot complain. For the same reason defendant's instructions numbers 16, 18 and 28 were properly refused.

The record in this appeal presents a clear case of a person who deliberately placed a deadly instrumentality at the front door of her house through the medium of which a human life has been taken unlawfully. We can conceive of no reason why the guilty party should not now suffer the penalties of the law.

Having examined carefully the entire record in this case and after giving full consideration to all of defendant's numerous assignments of error, we conclude that the defendant not only had a fair trial but the evidence abundantly sustained the verdict of the jury.

The judgment and sentence of the lower court are affirmed.

/s/ JAMES L. COKE
/s/ E. C. PETERS
/s/ F. M. BROOKS

C. B. Dwight (also on the briefs) for plaintiff in error.

K. E. Young, Assistant Public Prosecutor (C. E. Cassidy, Public Prosecutor, with him on the brief), for the Territory. [49]

[Endorsed]: Filed Oct. 20, 1939. At 10:38 o'clock A. M. Signed Chas. H. K. Holt, Clerk Supreme Court. [29]

In the Supreme Court of the Territory of Hawaii.
October Term, 1939.

No. 2376

THE TERRITORY OF HAWAII,
Plaintiff,

v.

ILENE WARREN, alias "SPEED" WARREN,
Defendant.

JUDGMENT ON WRIT OF ERROR

In the above entitled cause, pursuant to the opinion of the above entitled court rendered and

filed on this 20th day of October, 1939, the judgment and sentence of the lower court is affirmed.

Dated: Honolulu, T. H., October 20, 1939.

By the Court:

(S) CHAS. H. K. HOLT,
Clerk, Supreme Court.

Approved:

(S) JAMES L. COKE,
Chief Justice. [51]

[Endorsed]: Filed Oct. 20, 1939. At 10:40 o'clock A. M. (S) Chas. H. K. Holt, Clerk Supreme Court. [50]

[Title of Supreme Court of the Territory of Hawaii and Cause.]

DECISION

Petition for Rehearing.

Decided November 25, 1939.

Coke, C. J., Peters, J., and Circuit Judge Brooks in Place of Kemp, J., Disqualified.

Per Curiam. The decision of this court affirming the judgment and sentence of the lower court was rendered herein on October 20, 1939. On the same day and pursuant to the requirements of rule 10 of the supreme court rules the mandate was issued and the cause remitted to the circuit court.

Appellant has presented to this court a petition for rehearing but has made no application for the

recall of the mandate. The effect of the issuance of the mandate was to automatically remove the cause from the jurisdiction of this court and to reinstate it before the circuit court. A petition for rehearing is authorized under rule 5 of the supreme court rules and this rule provides that if the cause has been remitted to the lower court it may be recalled. It was incumbent upon appellant to take the necessary steps to recall the mandate so that this court would become reinvested with jurisdiction and thus empowered to consider the petition for rehearing. Where a party desires to present a petition for [61] rehearing to this court after the cause has been remanded to the court below he should make proper application for the recall of the mandate. Upon good cause shown this court may recall the mandate and resume jurisdiction of the case. Appellant having failed to obtain a recall of the mandate leaves this court wholly without jurisdiction and the petition for rehearing submitted herein should be and is dismissed.

The foregoing is not to be considered as any limitation upon, or restriction of, the inherent power of this court of its own motion seasonably made to take all necessary steps to correct its own opinions or judgments. Although without jurisdiction to pass upon the merits of the motion for rehearing, we have carefully examined it and entertain no doubt that were it properly before us for

consideration we would be compelled to deny the petition for lack of merit.

Petition dismissed.

By the Court

(S) GUS K. SPROAT
Deputy Clerk.

C. B. Dwight for the petition. [62]

[Endorsed]: Filed Nov. 25, 1939 At 9:36 o'clock A. M. (S) Gus K. Sproat, Deputy Clerk Supreme Court. [60]

6

No. 9506

IN THE

United States Circuit Court of Appeals

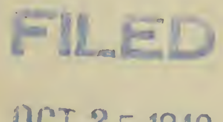
For the Ninth Circuit

ILENE WARREN, etc.,	
	Appellant,
vs.	
TERRITORY OF HAWAII,	
	Appellee.

REPLY BRIEF OF APPELLANT.

On Appeal from the Supreme Court of the Territory of Hawaii.

CHARLES B. DWIGHT,
Attorney for Ilene Warren, etc.,
Appellant.


FILED

OCT 25 1940

PAUL P. O'BRIEN,
CLERK

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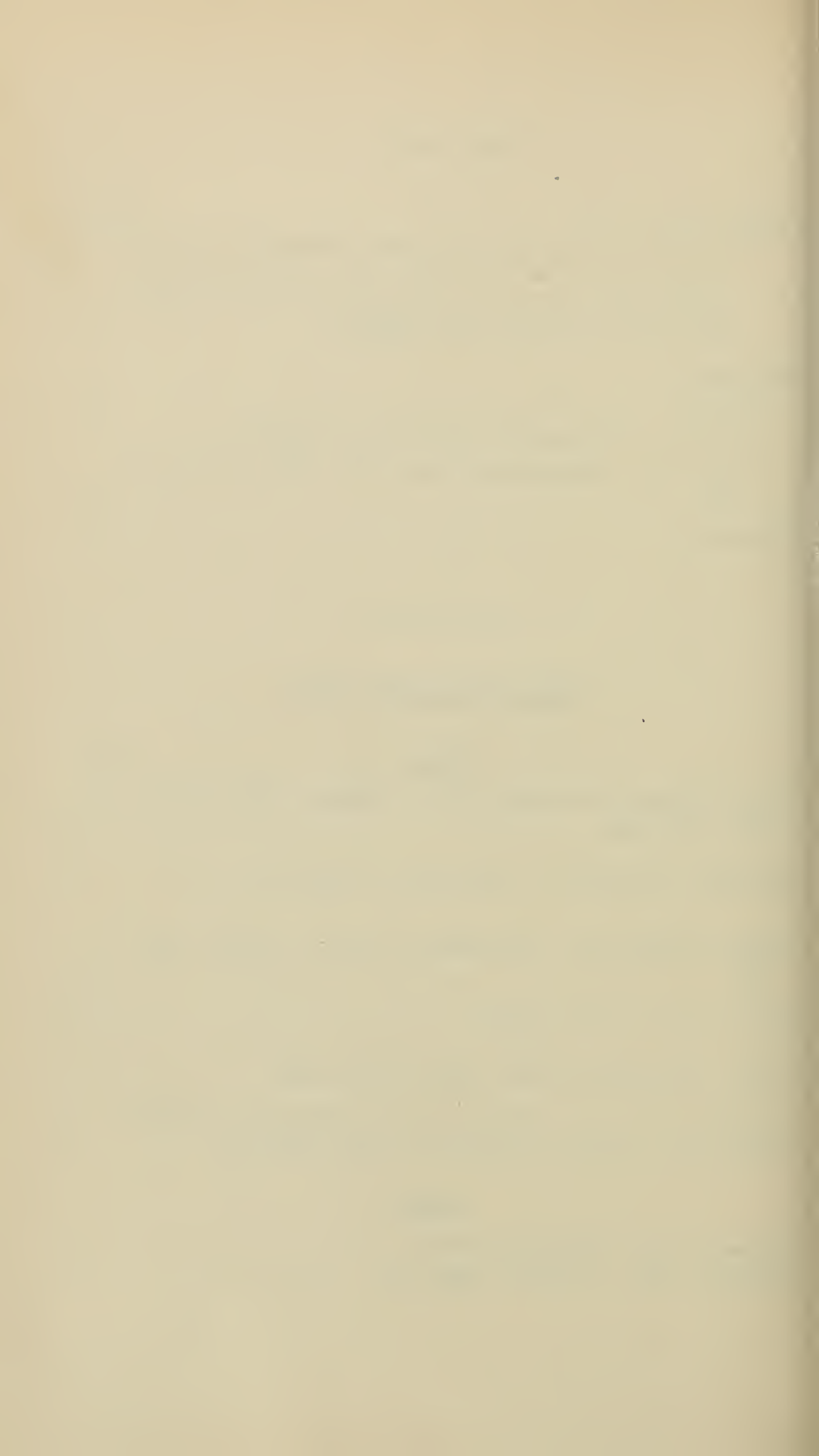

No. 9506

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ILENE WARREN, etc., *Appellant*, vs. TERRITORY OF HAWAII, *Appellee*.	}

REPLY BRIEF OF APPELLANT.

On Appeal from the Supreme Court of the Territory of Hawaii.

JURISDICTIONAL POINT.

PETITION FOR REHEARING HAVING BEEN SEASONABLY FILED AND CONSIDERED BY THE COURT, THE TIME WITHIN WHICH THE APPEAL MUST BE TAKEN COMMENCES TO RUN FROM THE DATE OF THE DECISION ON THE PETITION.

The Appellee in its brief raises a jurisdictional point and contends that the appeal should be dismissed for lack of jurisdiction upon the ground that the appeal herein was not duly made within three months after the entry of the judgment appealed from. It also contends that because the Supreme Court of Hawaii was without jurisdiction to consider the petition for rehearing, the filing of the petition, followed by a decision of the Supreme Court of

Hawaii thereon, did not extend the time allowed to appeal.

It is the respectful contention of Appellant that the filing of the petition for rehearing, within the time required by the rule and the consideration thereof by the Supreme Court as shown by its decision denying the motion, suspends the running of the time for taking an appeal, and that the time within which proceedings to review must be initiated begins from the date of the denial of the petition.

The rules of the Supreme Court of Hawaii, applicable to this issue are as follows:

> Rule 10. MANDATE:
>
> "1.—Whenever appropriate upon the determination of a matter in this Court a notice or mandate shall be issued to the Court below informing the Court of the proceedings in that Court as to Law and justice may appertain. The notice or mandate may issue at any time on the order of the Court or a Justice thereof, but unless otherwise ordered by the Court or a Justice thereof, it shall issue as of course after ten days from the rendition of judgment.
>
> 2.—In criminal cases the clerk shall forthwith issue the mandate upon the form being approved by one of the Justices."
>
> Rule 5 provides—
>
> "A petition for rehearing may be presented only within twenty days after the filing of the opinion or the rendition of judgment unless by special leave additional time is granted during such twenty days by the court or a justice thereof; and shall briefly and distinctly state its grounds,

> and be supported by certificate of counsel; and will not be permitted to be argued unless a justice who concurred in the opinion or judgment desires it. If the case has been remitted to the lower court it may be recalled."

The Appellant respectfully contends that the petition for rehearing was in proper form and seasonably filed and was entertained by the Supreme Court; that the time for filing the appeal herein commenced to run from the disposition of the petition on November 25, 1939 (Rec. 669-71), and that therefore the appeal herein was taken in time.

It is conceded by Appellee that the petition for rehearing was in proper form and filed in time. It is contended, however, by Appellee that the Supreme Court was without jurisdiction to grant or deny the petition and that the decision denying the petition could not be construed as being an entertainment of the petition by the Court.

The Supreme Court, in its decision on the petition for rehearing said:

> "The foregoing is not to be considered as any limitation upon, or restriction of, the inherent power of this court of its own motion seasonably made to take all necessary steps to correct its opinions and judgments. Although without jurisdiction to pass upon the merits of the motion for rehearing, *we have carefully examined it* and entertain no doubt that were it properly before us for consideration we would be compelled to deny the petition for lack of merit.
>
> Petition dismissed."
>
> (Record pages 670-671.)

Clearly the Court entertained the Petition and that is all that is necessary to enlarge the time to appeal.

> "Petition for rehearing though defective, but not mere sham, where petitioner acts in good faith will toll limitation for taking appeal."
>
> *Thos. Day Co. v. Doble Laboratories,* 41 Fed. (2) 51;
>
> *Larkin Packer Co. v. Hendesleter Tool Co.,* 60 Fed. (2) 491.

> "When a motion for a new trial, in a Court at Law or a petition for rehearing in a Court of equity is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and the time within which the proceedings to review must be initiated begins from the date of the denial of the motion."
>
> *Morse v. U. S.,* 70 Law. Ed. 518.

> "The filing of a motion for a new trial within the judgment term, is effective to carry the judgment over, for writ of error purposes, beyond the term, if the motion is at any time, during the term or thereafter considered—'entertained' by the trial Court."
>
> *Payne v. Garth,* 285 Fed. 301, 309.

In *Day Co. v. Doble Laboratories,* supra, this Court said,

> "Petition for rehearing although not filed in time held effective to toll limitation for taking appeal."
>
> 41 Fed. (2) 51.

The authorities cited by Appellee do not support its contentions.

The case of *Browder v. McArthur,* 7 Wheat. 58, 5 L. Ed. 397, was a case wherein the Supreme Court denied a petition for rehearing of a case determined at the prior term and remitted to the lower Court. The Supreme Court simply adopted the practice then prevailing before the Courts of Kings Bench and of Chancery in England, which was the practice adopted by the Supreme Court from its inception and finally incorporated in rule 30 of the rules of January 7, 1884, 108 U. S.

It is elementary that under the common law, a Court cannot modify its judgments after the expiration of the term in which the judgment was rendered.

The case of *Peck v. Sanderson,* 18 How. 42, 15 L. Ed. 262, is to the same effect as the *Browder* case, supra. This case was decided at a prior term, and a motion was made to re-argue. The Court denied the motion because it was filed too late.

The case of *Texas Pac. Ry. Co. v. Murphy,* 111 U. S. 488, 28 L. Ed. 492, cited by appellee, really supports the position of appellant, for it held,

> "If a petition for rehearing is presented in season and entertained by the Court, the time limited for an appeal or writ of error does not begin to run until the petition is disposed of."

The case of *The Aspen Mining and Smelting Co. v. Billings*, 150 U. S. 31, 37 L. Ed. 986, is to the same effect as the case of *Texas Pacific Railway Company v. Murphy,* for the decision is the same which is,

> "If a motion or a petition for rehearing is made or presented in season and entertained by the Court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of."

It is further respectfully submitted that the appeal was taken within the time required by law as the petition for re-hearing was seasonably filed and entertained by the Court and the decision on the petition for re-hearing was entered on November 25, 1939 and that three months had not expired from that date when the appeal was taken.

ARGUMENT.

POINT I.

As to Assignments of Error No. III, the Appellee contends that where a police officer is invited into a house of prostitution, apparently open to any prospective customer, at the request of the person in control who does not know he is a police officer, the police officer may testify as to what he sees or hears therein.

The weakness of the contention is borne out by the fact that not one of the police officers in the raiding squad, knew as a fact, that the defendant's home was a house of prostitution. They simply visited the defendant's home to raid it, in the hope that some evidence of prostitution might be unearthed. In so far as any direct knowledge on the part of Burns that Appellant's home was a house of prosti-

tution is concerned, he had absolutely no such knowledge.

The fact that there was evidence in the case that Appellant did operate a house of prostitution, does not prove that the officers had such knowledge, but on the contrary, the evidence shows that they had no such knowledge.

POINT II.

ASSIGNMENTS OF ERROR IV, V AND VI.

The Appellee contends that the evidence of the witnesses Rodgers, Kiehm and Penland was competent because it was obtained from a source independent of the illegal search and seizure.

The testimony of these witnesses both on cross and by direct examination, as more fully set forth in the opening brief conclusively shows that the police first obtained the information of the existence of the equipment through the illegal seizure and used that information to extract the evidence regarding the equipment from the witnesses.

The fact that the police had knowledge of the equipment prior to ruling of the trial Court suppressing the same is immaterial. The fact that the witnesses were present in the house when the death occurred and had knowledge of the equipment at the time does not make their testimony competent.

It is reiterated that the Government had no knowledge of the existence of the equipment until the illegal seizure was made.

POINT III.

ASSIGNMENTS OF ERROR VII, VIII, IX, X AND XI.

The Appellee contends that because the Supreme Court of Hawaii said the constitutional question should not have been injected into the case, this Court should not pass upon the question.

The fact is that the Appellant's Constitutional rights were directly affected by the instructions. The instructions were given over objection and were erroneous and that therefore, the Court committed reversible error.

However, Appellee contends that Section 5404 of the Revised Laws is constitutional because there is no prohibition in the Fourth Amendment against an arrest without a warrant or an arrest on reasonable suspicion but only that the prohibition is against unreasonable searches and seizure.

The Appellant does not dispute that contention but does submit that any arrest not made in accordance with the Amendment is unreasonable and prohibited by the Amendment.

A statute which permits arrests in cases of misdemeanors where the offense is not committed in the presence of the arresting officer permits unreasonable arrests which are prohibited by the Amendment, and Section 5404 R. L. Hawaii, 1935, comes clearly within that class of statute.

CONCLUSION.

It is therefore respectfully submitted that the contentions of Appellee are without merit and that the Judgment appealed from should be reversed.

Dated at Honolulu, T. H. this 12th day of October, A. D. 1940.

Respectfully submitted,

CHARLES B. DWIGHT,

Attorney for Ilene Warren, etc., Appellant.

No. 9531

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EARL CANNING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT EARL CANNING

Upon Appeal From the United States District Court For the District of Arizona

FILED

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GENE S. CUNNINGHAM
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419 Title & Trust Bldg.,
Phoenix, Arizona.
Attorneys for Appellant Earl Canning.

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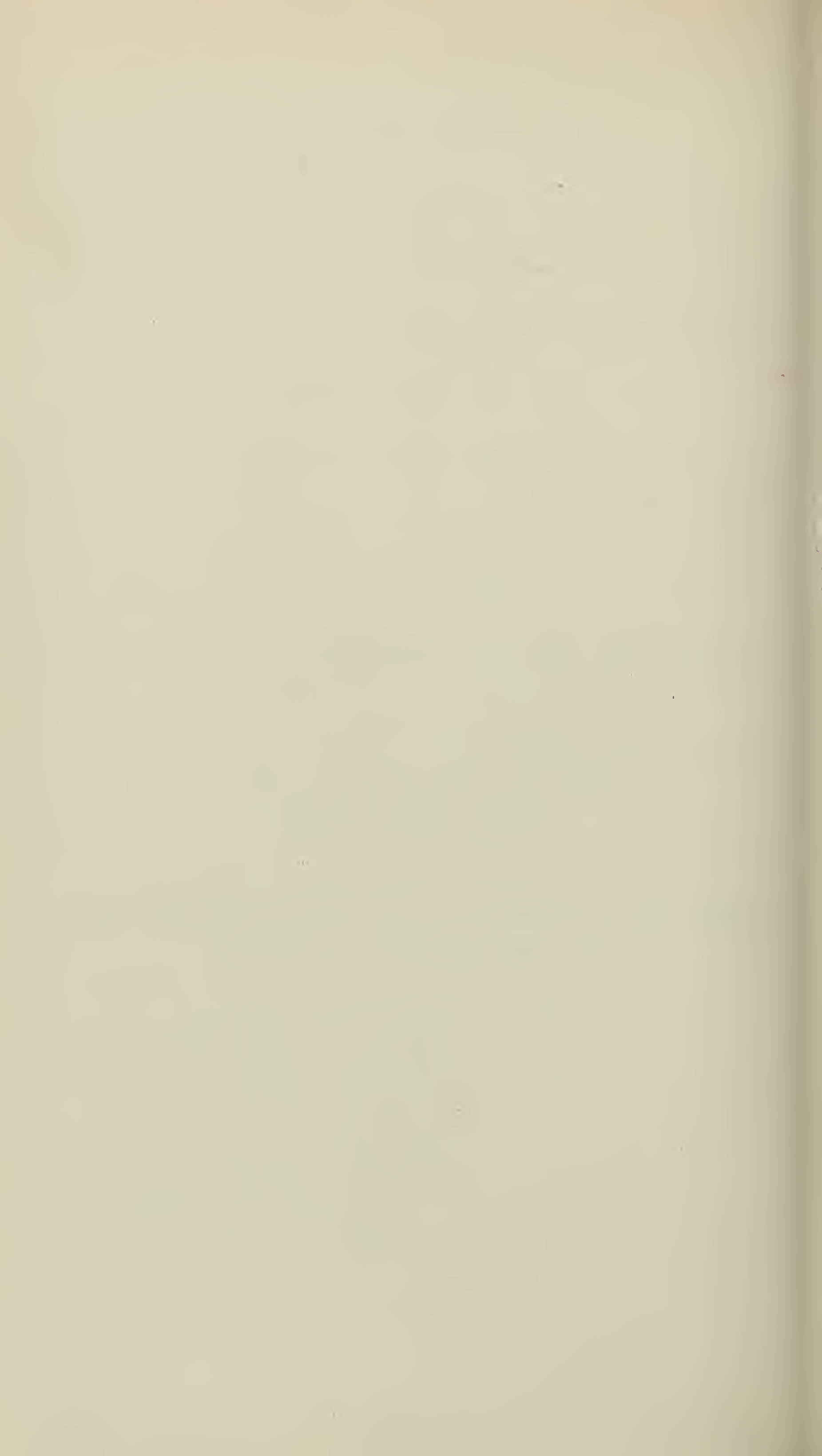

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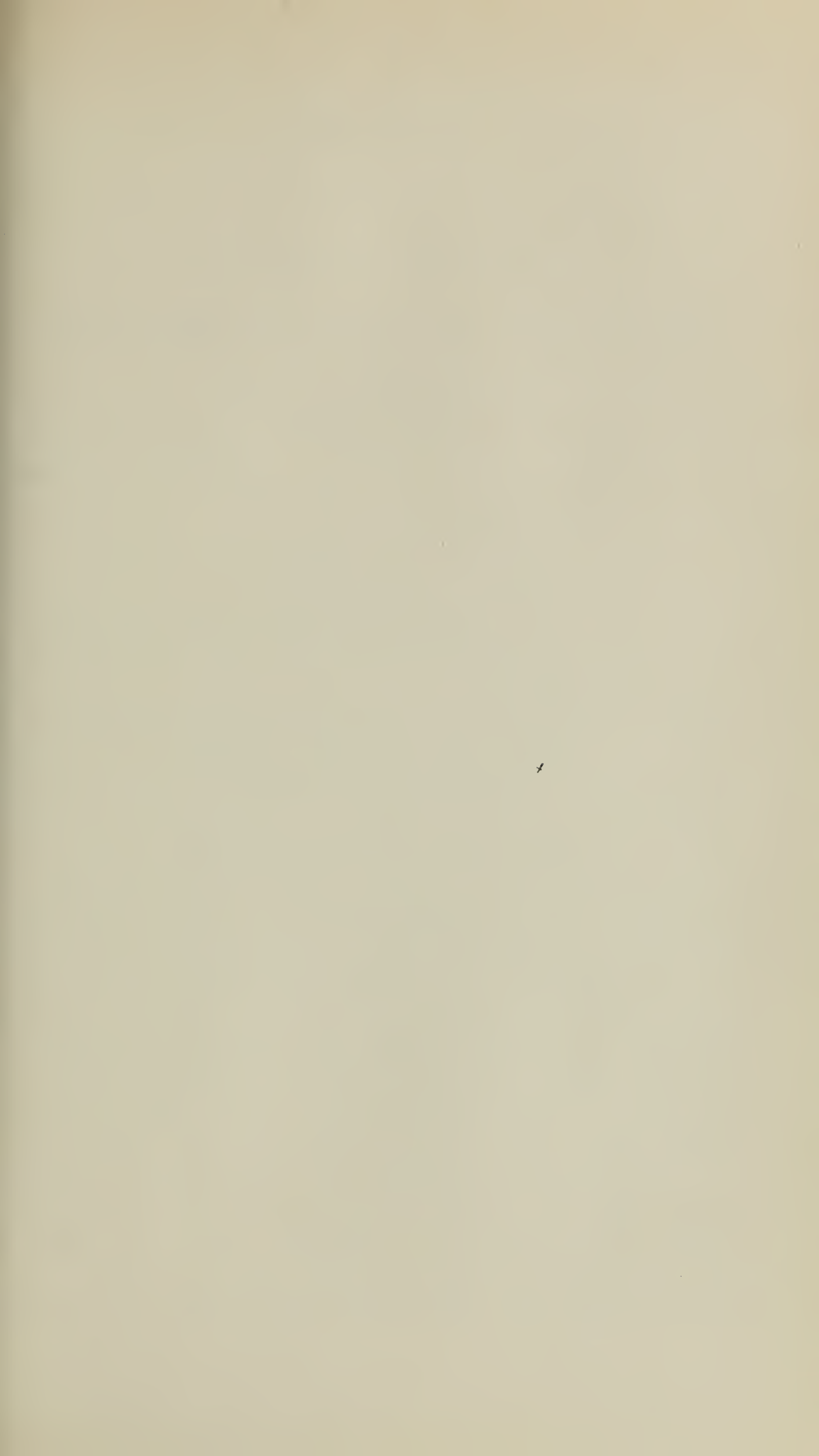

No. 9531

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EARL CANNING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT EARL CANNING

STATEMENT OF THE CASE

Appellant Earl Canning appeals from a judgment of the District Court of the United States, for the District of Arizona, finding him guilty and sentencing him to a term of imprisonment of one year in jail under the sixth count of an indictment under which he was charged with Raymond F. Marquis, George H. Cornes, Harry S. Marquis and Edgar G. Hamilton jointly, in the first five counts thereof, with the use of the United States mails in furtherance of a scheme to defraud (Sec. 338, Title 18, USCA, Sec. 215 Criminal Code) and in the sixth count jointly with the same persons with conspiracy to use the mails in furtherance of a scheme to defraud (Sec. 88, Title 18, USCA, Sec. 37 Criminal Code).

INDICTMENT

The indictment is set forth in full in the transcript of the record at pages 158-236.* In substance it charges that Raymond F. Marquis, George H. Cornes, Harry S. Marquis, Earl Canning and Edgar G. Hamilton in the first five counts with the use of the United States mails in furtherance of a scheme to defraud, and in the sixth count with conspiracy to use the mails in furtherance of a scheme to defraud.

FIRST COUNT

It is charged in the first count that the defendants devised a scheme and artifice to obtain moneys and properties from each of the individuals named as the persons to be defrauded in the first five counts of the indictment, and alleges that the scheme and artifice was to defraud and that the scheme was to be effected by,

(1) The incorporation of the State Securities Corporation for the alleged purpose of selling stocks and bonds to raise money to purchase or establish a life insurance company, the Union Reserve Life Insurance Company, the capital stock of the State Securities Corporation being represented by 250,000 shares of stock of no par value.

(2) That the defendants would secure for themselves and other incorporators 50,000 shares of the capital stock of State Securities Corporation for the purpose of reselling the same to persons to be defrauded and to retain proceeds of such sales for the sole benefit of defendants.

*Where figures alone appear they refer to pages in Transcript of the record.

(3) That defendants would sell to persons to be defrauded such shares of stock by making false and fraudulent pretenses, representations and promises concerning the value of said stock and payment of dividends and by representing that dividends had been voted.

(4) That the State Securities Corporation was to purchase and obtain control of the insurance company for the purpose of aiding defendants in the sale of stocks and bonds of the said State Securities Corporation to the persons to be defrauded.

(5) That said defendants after having sold bonds of the State Securities Corporation to the persons to be defrauded would by false and fraudulent pretenses and representations induce the holders of said bonds to exchange them for shares of the capital stock of State Securities Corporation.

It is further alleged that among the material false and fraudulent pretenses and representations, so made and to be made by defendants to persons to be defrauded, for the purpose of inducing said persons to invest moneys and property in the bonds and shares of stock of State Securities Corporation were the following:

(a) That the shares of stock of State Securities Corporation would pay back dividends and that a dividend of seven per cent, or more, would be paid within a year, whereas in truth and in fact dividends would not be paid upon the stock of said State Securities Corporation.

(b) That in December, 1937, a dividend had been voted by the Board of Directors of State Securities Cor-

poration and would be paid in January, 1938, whereas in truth and fact the Board of Directors never did vote a dividend and there was no reason to believe that a dividend would be paid.

(c) That the defendants, as officers of the State Securities Corporation and of the Union Reserve Life Insurance Company, were not drawing salaries from either of said companies, whereas defendants, and each of them, did draw large sums of money from each of said companies for services allegedly rendered said companies.

(d) That the State Securities Corporation was in good financial condition and on December 31, 1931, had assets over liabilities in the amount of $135,660.41, whereas the State Securities Corporation in truth and fact was not in good financial condition and did not on December 31, 1931, or at any other time, have assets in excess of liabilities in the amount of $135,660.41 or in any amount approximating that sum, or at all.

(e) That during the year 1936, the mortgage loans of the Union Reserve Life Insurance Company were increased twelve percent, whereas in truth and fact the loans were not increased in any amount *by the investment of additional funds of the insurance company, but that the increase appearing upon the books of Union Reserve Life Insurance Company was a mere write up of the value of mortgage loans already existing.**

(f) That on December 31, 1936, the Union Reserve Life Insurance Company had bonds and cash items on

*Emphasis, unless otherwise noted, is ours.

hand in the bank in the amount of $22,574.50, whereas it did not have on hand such assets in that amount, but that included in such items, as shown upon the books of Union Reserve Life Insurance Company were certain items and assets received by the Union Reserve Life Insurance Company in January and February, 1937, amounting to approximately $6,259.25.

(g) That on December 31, 1936, the Union Reserve Life Insurance Company had on hand cash in the amount of $7,653.37, whereas actually it had on hand at that time cash in the amount of approximately $1394.12 only.

(h) That on June 30, 1937, 19022 shares of the capital stock of State Securities Corporation were issued and outstanding, whereas on said date, *to all intents and purposes* there were 50,000 shares of its capital stock issued and outstanding in that the Articles of Incorporation of said State Securities Corporation provided for the allocation of 50,000 shares to the incorporators and by resolution of the Board of Directors the allocation and issuance of said 50,000 shares was ratified, approved and confirmed.

It is charged in the first count that in furtherance of the scheme and artifice, above set forth, the defendants mailed to Guy J. Baker, Casa Grande, Arizona, a letter which is set out in the first count.

SECOND COUNT

The second count adopts the allegations of the first count as to the scheme and artifice therein alleged and then alleges that in furtherance of such scheme the de-

fendants mailed to H. E. Simmons, Cave Creek, Arizona, the letter set forth in said count.

THIRD COUNT

The third count adopts the allegations as to the scheme and artifice set forth in the first count and then alleges in furtherance thereof the defendants mailed to Mrs. May E. Bonar, 211 West Elm Street, Compton, California, the letter therein set out.

FOURTH COUNT

The fourth count of the indictment adopts the allegations as to the scheme and artifice to defraud set forth in the first count and alleges in furtherance of such scheme the defendants mailed to Gerald Palmer, Cross Triangle Guest Ranch, Prescott, Arizona, the letter therein set out.

FIFTH COUNT

The fifth count adopts the allegations of the scheme and artifice to defraud set forth in the first count and alleges that in furtherance thereof the defendants mailed to Mr. and Mrs. W. H. Etz, Yarnell, Arizona, the letter therein set forth.

SIXTH COUNT

The sixth count alleges that beginning on or about December 1, 1929, and continuing until on or about January 1, 1938, the defendants did conspire, confederate, combine and agree together and with each other to *commit divers offenses charged against said defendants in the preceding five counts, made offenses by section*

215 *of the Criminal Code of the United States*, the allegations of which five counts are incorporated in the sixth count by reference and to use the Post Office establishment of the United States in the commission of said offenses, and charges that to effect the object of the conspiracy the defendants performed,

(a) The several acts of placing letters in the Post Office establishment of the United States at Phoenix, Arizona described in the preceding five counts of the indictment.

(b) The numerous acts of preparing said letters for mailing and delivery and the making of the false and fraudulent, pretenses in the first count of the indictment described and obtaining by means thereof the moneys and properties of the persons named in the first count of the indictment as well as certain other overt acts in the indictment specified:

1. That, in furtherance of said conspiracy, on or about November 26, 1937, defendants prepared and caused to be prepared the combined balance sheet of the corporation and insurance company as of June 30, 1937;

2. That, in furtherance of said conspiracy, on or about November 26, 1937, defendants mailed and caused to be mailed to stockholders of the corporation and others a letter dated November 26, 1937, and included in said letter a copy of the combined balance sheet of the corporation and the insurance company as of June 30, 1937;

3. That subsequent to December 31, 1936, and while said conspiracy was in existence, as hereinbefore alleged, and in furtherance thereof, the defendants prepared and caused to be prepared an annual statment of the insurance company covering the year ending December 31, 1936;

4. That subsequent to December 31, 1936, and on or about March 8, 1937, and in furtherance of said conspiracy, the defendants filed and caused to be filed with the Arizona Corporation Commission the annual statement of the insurance company;

5. That in furtherance of said conspiracy, on or about March 2, 1937, the defendants mailed and caused to be mailed to stockholders and bondholders of the corporation a financial statement of the Union Reserve Life Insurance Company as of December 31, 1936;

To this indictment the appellant Earl Canning filed a demurrer, which was by the Court overruled and exception noted (80).

BILL OF PARTICULARS

Appellant Earl Canning filed a request for a Bill of Particulars and the government filed what it considered to be a Bill of Particulars in compliance with his request. Thereafter appellant Earl Canning filed objections to the Bill of Particulars, as filed by the government, and a request for a supplemental Bill of Particulars, which objections and request were separately and severally denied by the Court and exceptions duly noted (82).

PLEA OF NOT GUILTY

The appellant Earl Canning entered a plea of not guilty and persists in the same. All of the other defendants pleaded not guilty.

TRIAL

The trial commenced on March 19, 1940, and continued from day to day, until April 12, 1940, when the cause was submitted to the jury and the jury on April 13 1940, returned into open Court their verdicts finding the defendant Raymond F. Marquis guilty on all six counts of the indictment; defendant George H. Cornes guilty on counts three, five and six of the indictment and not guilty on counts one, two and four; Harry S. Marquis guilty on count six and not guilty on counts one, two, three, four and five; defendant Edgar G. Hamilton guilty on counts five and six and not guilty on counts one, two, three and four, and appellant Earl Canning guilty on count six and not guilty on counts one, two, three, four and five.

At the beginning of the trial, upon stipulation of all of the attorneys, the Court made an order that any objection made on behalf of any defendant, or an exception taken on behalf of any defendant, should inure to the benefit of all. This was for the purpose of preventing the necessity of the attorney for each defendant repeating objections made by some other attorney and the resultant confusion in the trial.

EVIDENCE

It would lengthen this statement of the case unduly to here again detail all of the evidence and objections

which are set forth in full in the Transcript of the Record, and which will be referred to in the discussion of the assignments of error later in this brief, but it is thought that a condensed, concise statement of the ultimate facts shown by the evidence will at this point be helpful.

It was shown by the evidence that Raymond F. Marquis in December, 1929, in cooperation with Harry S. Marquis and George H. Cornes, co-defendants, and in cooperation with other persons not named in the indictment, but including W. C. Ellis, R. J. Leavitt, James H. Kerby, Herbert S. Hall and E. J. Flannigan, formed a corporation under the laws of the State of Arizona and secured from the Corporation Commission of the State of Arizona a certificate of incorporation and permits to sell stocks and bonds.

It was shown that the purpose of the corporation was to sell its stocks and bonds and to accumulate in this manner sufficient funds and the securities in which the same should be invested to furnish the capital and the securities to be deposited with the Arizona Corporation Commission of and by a life insurance company, which it was planned to organize, or purchase, when sufficient funds had been accumulated.

The State Securities Corporation then began the sale of stocks and bonds and in December, 1929, a set of books for the State Securities Corporation was set up and the method of accounting set up by the defendant Raymond F. Marquis.

It was shown that the defendants Raymond F. Marquis, Harry S. Marquis and George H. Cornes together

with other persons not indicted, continued to sell the stocks and bonds of the State Securities Corporation and that in the latter part of March, 1933, the State Securities Corporation by stock purchase acquired the majority of the stock of the Union Reserve Life Insurance Company, an Arizona corporation, which had been first organized under the name of the First National Life Insurance Company, which name was changed in October, 1932, prior to the acquisition of the majority of its stock by State Securities Corporation to Union Reserve Life Insurance Company; that up until this time none of the defendants had any connection with the insurance company.

The defendants Raymond F. Marquis, George H. Cornes and Henry S. Marquis almost from the inception of the State Securities Corporation had been officers of that corporation and members of the executive committee of that corporation. Upon the acquisition of the stock of the Union Reserve Life Insurance Company the same three defendants became officers and members of the executive committee of the Union Reserve Life Insurance Company. Each of the two companies had numerous other directors who were not named in the indictment and among whom were some of the substantial citizens of Arizona.

The names of the directors of the State Securities Corporation and of the Union Reserve Life Insurance Company are in evidence and appear in the minutes of the two companies. The Union Reserve Life Insurance Company, particularly after its management was taken over by defendants Raymond F. Marquis, Harry S. Marquis and George H. Cornes,

wrote a great deal of life insurance and continued meeting promptly claims against it until the late Fall of 1937. The Union Reserve Life Insurance Company had re-insured a proportion of all of its risks with the Lincoln National Life Insurance Company. In the Fall of 1937 the Lincoln National Life Insurance Company undertook to cancel its re-insurance contract with the Union Reserve Life Insurance Company on the ground that the premiums due thereunder had not been paid. During the time that the Lincoln National Life Insurance Company claimed that its contract of re-insurance was no longer in effect and the Union Reserve Life Insurance Company claimed that it was in full force and effect, the Union Reserve Life Insurance Company suffered heavy claims through the deaths of certain persons insured by it in large amounts. The re-insurance contract of the Lincoln National Life Insurance Company was re-instated in January, 1938, but again it was claimed by the Lincoln National Life Insurance Company that the contract had again been cancelled in February, 1938. This left the Union Reserve Life Insurance Company without sufficient quick assets to pay the large claims that had matured against it through the deaths referred to above and the directors of the Union Reserve Life Insurance Company turned its business over to the Corporation Commission of Arizona in March, 1938.

While all of the bonds of said State Securities Corporation, which were sold were sold prior to the acquisition of the Union Reserve Life Insurance Company in 1933, some sales and attempts to sell stock were continued until about January 1, 1938.

Shortly after the Union Reserve Life Insurance Company was turned over to the Arizona Corporation Commission, a receiver was appointed by the Superior Court of the State of Arizona, in and for the County of Maricopa, for the State Securities Corporation. The appellant Earl Canning was first appointed receiver and served about a month, at which time he was succeeded by Hugh T. Cuthbert, who continued as such receiver of State Securities Corporation at least until after the trial of this cause in the District Court.

The defendant Edgar G. Hamilton joined the Union Reserve Life Insurance Company as a salesman in August, 1935, and continued in that capacity until about the time the Corporation Commission took over its affairs.

It was claimed by defendant Edgar G. Hamilton that he had no part in the management or control of either of the two companies. It was claimed by the defendant George H. Cornes that while he was an officer and member of the executive committee of each of the two companies, most of his time was spent either in the field selling, in the beginning stocks and bonds of the State Securities Corporation, and in the latter part of the operation of the two companies in the selling of insurance. It was claimed by defendant Harry S. Marquis that while he was an officer and member of the executive committee of each of the two companies, his time was largely taken up in the field in work connected with the reinstatement of insurance policies in the Union Reserve Life Insurance Company after the acquisition of the Union Reserve Life Insurance Company and prior thereto

in sales of bonds of the State Securities Corporation. It was thus claimed by the three co-defendants named that Raymond F. Marquis was the directing head of both companies and Raymond F. Marquis testified that he was, but for the purposes of this appeal for appellant Earl Canning, this matter becomes immaterial.

There was evidence introduced of the mailing of the letters set forth in the five counts of the indictment and of representations made to purchasers of stocks and bonds by each of appellant's co-defendants Raymond F. Marquis, George H. Cornes, Harry S. Marquis and Edgar G. Hamilton, which the government charged were false and fraudulent.

The government also introduced evidence that each of the four named co-defendants have drawn large sums of money from the State Securities Corporation and the Union Reserve Life Insurance Company.

A great deal of evidence, documentary and otherwise, was presented by the government to which the appellant Earl Canning objected on the ground that there had been no proper foundation laid as to him, no proper identification and that as to him such evidence was pure hearsay, and he requested that the Court at the time of the reception of such evidence limit its effect to the defendant or defendants against whom it was directed and instruct the jury that they could not take it into consideration as to him. His objections and request were overruled and denied and execeptions duly noted (247-250-258-261-287-305-394-445-480-481).

AS TO APPELLANT EARL CANNING

The evidence as to the connection of the defendant Earl Canning with the State Securities Corporation and the Union Reserve Life Insurance Company summarized is as follows:

The appellant was first employed by the State Securities Corporation through his co-defendant Raymond F. Marquis in March, 1930; that thereafter he kept the books of the State Securities Corporation from cancelled checks, stubs and memoranda furnished him by the employees in the office of the State Securities Corporation and assisted in the preparation of financial statements from such books and records; that in keeping the books he was not regularly or continuously employed by State Securities Corporation, but posted the books from such memoranda, cancelled checks and check stubs either in his own independent office or in the office of the State Securities Corporation at odd times; that subsequent to the acquisition of the majority stockholdings in the Union Reserve Life Insurance Company in 1933 its books were kept by government witness King Wilson and Ora T. Hill and other employees in the office of Union Reserve Life Insurance Company, and that as to such books the appellant Earl Canning assisted in making certain reports and financial statements.

For this work it was agreed that he would receive $2.00 per hour up until the time he became a certified public accountant and that thereafter he would receive $3.00 per hour. It was shown that at these rates he earned during his entire service for the two companies from 1930 to 1938, inclusive, $6082.25 of which he was

paid $5623.55 leaving a balance still due him of $458.70, Defendant's Exhibit No. AM in evidence (733).

It was shown by government's witnesses Ora T. Hill (285-317 338-457) and King Wilson (261) and by defendant Raymond F. Marquis that appellant Earl Canning had nothing to do with the policy, management or control of either of said companies and there was no evidence from any source that appellant Earl Canning ever sold or assisted in the sale or attempted to sell or assisted in any attempt to sell any stocks or bonds or any life insurance policies or that he profited from any of the activities of the companies or either of them, or any of his co-defendants, except to the extent of his employment at his usual and ordinary rates of $2.00 per hour up until the time he became a certified public accountant and $3.00 per hour thereafter.

Since the jury acquitted the defendant Earl Canning on the first five counts of the indictment, in which counts are contained all of the allegations of the indictment which charge or attempt to charge any false or fraudulent statement in any of the financial statements involved, it is deemed unnecessary in this statement of the evidence to review in detail the evidence offered by the government through its witness E. P. Hair, an accountant of the Federal Bureau of Investigation, in criticism of financial statements made by the defendant Earl Canning, since such criticism was offered in support of the allegations contained in Count 1 of the indictment upon which the defendant Earl Canning was acquitted.

It was shown by the evidence that the annual statement of the Union Reserve Life Insurance Company as

of December 31, 1936, referred to in paragraphs 3 and 4 of the sixth count of the indictment, was prepared shortly before March 8, 1937, as is alleged in paragraph 4 of the sixth count of the indictment. It was testified by government's witness King Wilson and Ora T. Hill and by the appellant Earl Canning that of the annual statement he assisted in the preparation of pages 1, 2, 3, 4, 5 only; that the balance of the annual statement was prepared and signed by the officers and employees of the Union Reserve Life Insurance Company without any assistance from Mr. Canning. It was testified by government's witness E. P. Hair that such annual statement, in so far as it purported to reflect the books of the Union Reserve Life Insurance Company, was correct (637).

It was shown by the books themselves in evidence as Exhibits No. 8-10-11-12 that such annual statement does correctly reflect the books. It was testified to by government's witness King Wilson and defendant Raymond F. Marquis and defendant Earl Canning and other witnesses, that the actuarial calculations contained in such statement were made by government's witness King Wilson and defendant Raymond F. Marquis and not by defendant Earl Canning and his certificate specifically excepts such actuarial calculations.

In the first count of the indictment the annual statement as of December 31, 1936, is criticized in three particulars,

(a) That the mortgage loans of the insurance company were increased by a mere write up of the value of the mortgage loans already existing on the books. In this regard the minutes of the State Securities Cor-

poration, Exhibit No. 26C- 26G 26V 26J in evidence, and the minutes of Union Reserve Life Insurance Company, Exhibit 27B in evidence, show that increased loans were authorized and the mortgages themselves for the alleged fictitious increases are in evidence as Exhibits AI, AI-2 and AG1-AH1.

(b) That the said statement as of December 31, 1936, was erroneous in that it included certain items and assets received by the company in January and February, 1937, amounting to approximately $6259.25. In this connection the government's witness E. P. Hair testified that the statment correctly reflected the books. It was testified that as is alleged in paragraph 4 of the sixth count of the indictment, the annual statement as of December 31, 1936, was prepared on or shortly before March 8th in 1937 and that at such time cash items which otherwise woud have been included in the statement as of December 31, 1936, had been collected in cash and that the cash for such subsequently collected cash items had been entered in the books under date of December 31, 1936. It was further testified that such practice is usual and customary with insurance companies for the reason that they are compelled to calculate their reserves in advance of the receipt of premiums and that these cash items, subsequently collected, were premiums due and deferred and that the result of entering them as of December 31, 1936, although received subsequently thereto, and in January and February, 1937, did not at all change the statement of assets and liabilities; that the cash was merely substituted for a like amount of due and deferred premiums because the cash had been received at the time the statment was made.

On these criticisms of the statment as of December 31, 1936, the appellant Earl Canning was acquitted.

In the sixth count of the indictment there is no allegation of anything wrong, fraudulent or misleading concerning the annual statement as of December 31, 1936.

In the evidence it was testified that the Home Owners Loan Corporation bonds shown by the ledger (Exhibit No. 12) to have been in the possession of the Union Reserve Life Insurance Company on December 31, 1937, were in fact at that time pledged to a bank as collateral (446-456), but government's witness E. P. Hair testified that the annual statement correctly reflected the ledger.

The statement contained in the annual statement as of December 31, 1936, filed with the Arizona Corporation Commission stating that all bonds and securities shown by the statement had been checked and found in the possession of the Union Reserve Life Insurance Company, appearing on page 8 of the annual statement, was not made by the appellant Earl Canning, but on the contrary was made, as appears form the evidence (261) by government's witness King Wilson. The combined balance sheet of the State Securities Corporation and the Union Reserve Life Insurance Company as of June 30, 1937, prepared on or about November 26, 1937, it was testified to by government's witness E. P. Hair correctly reflects the ledger items as carried in the books, which it purports to reflect. It was testified by defendant Raymond F. Marquis (698) and the government's witness King Wilson (268) and appellant Earl Canning (734)

that the actuarial figures and calculations contained on that combined balance sheet were prepared and furnished by defendant Raymond F. Marquis and the government's witness King Wilson and in his certificate on such combined balance sheet, as of June 30, 1937, appellant Earl Canning excepts such actuarial calculations.

There was no evidence that the appellant Earl Canning ever mailed or caused to be mailed to any person whomsoever any letter, or any financial statement and no evidence that he ever mailed or caused to be mailed the combined balance sheet of the corporation and the insurance company as of June 30, 1937, referred to in paragraph 2 of the sixth count of the indictment, and no evidence that he mailed any financial statement referred to in paragraph 5 of the sixth count of the indictment.

At the conclusion of the government's case the appellant Earl Canning moved to strike certain exhibits, which will be more fully discussed under the assignments of error, which motions were by the Court denied and exceptions duly entered.

At the close of the government's case appellant Earl Canning moved for a directed verdict, separately and severally as to each count of the indictment, which motions were by the Court separately and severally denied and the exceptions duly noted.

At the conclusion of the whole case appellant Earl Canning moved to strike certain evidence to which objections had been made and exceptions noted, which exceptions under the stipulation made at the beginning of

the trial were for the benefit of appellant Earl Canning, which motions to strike were separately and severally denied by the Court and exceptions duly noted. At the close of the whole case the defendant Earl Canning again moved the Court to direct the jury to return verdicts of not guilty as to him, which motions were by the Court denied and exceptions duly noted.

During the trial the defendant Earl Canning made timely request that the Court give to the jury certain instructions as set forth in the Transcript of the Record, pages 83-103. The Court at the conclusion of the evidence and argument marked appellant Earl Canning's requested instructions as given or refused and filed them with the Clerk, and the Court instructed the jury to which refusal of the Court to give his requested instructions and to the instructions, as given by the Court, the appellant Earl Canning, in open Court, duly excepted and such exceptions were duly noted.

The jury returned a verdict finding the appellant Earl Canning guilty on count six (this is the conspiracy count of the indictment) and finding him not guilty on counts one, two, three, four and five (mail fraud counts of the indictment).

On the 13th day of May, 1940, the Court pronounced judgment that the appellant Earl Canning was guilty as charged in the sixth count of the indictment and sentenced him to a year in jail.

On the same date the appellant Earl Canning filed his notice of appeal and also filed his bail bond on appeal.

The Bill of Exceptions has been timely allowed and assignments of error have been timely filed, and the case is now here on appeal.

SPECIFICATION OF ERRORS

Appellant Earl Canning relies upon all and each of the assignments of error, which are set forth in the transcript of record beginning on page 158.

The appropriate assignments of error will be set out in full in this brief in the argument under the several questions herein presented.

QUESTIONS PRESENTED

The questions presented on this appeal are:

I.

Is the indictment fatally defective?

II.

Did the Court err in overruling the objections of the appellant to the bill of particulars as furnished by the government, and in denying appellant's request for a further bill of particulars?

III.

Did the Court err in admitting, as against this appellant, evidence of acts and declarations of alleged co-conspirators in the absence of any sufficient evidence that the appellant had entered into any conspiracy, and in the absence of any evidence that the appellant had any knowledge of such acts and declarations?

IV.

Did the Court err in admitting in evidence books, records and cancelled checks and check stubs for the further reason that no materiality was shown and there was no proof that such books and records and the entries therein were kept in the regular course of business, and no compliance with the requirements of Section 695, Title 28, U.S.C.A. and for the reason that as construed by the District Court said section is unconstitutional because it violates the sixth amendment to the Constitution of the United States?

V.

Did the Court err in refusing to keep the government's witness King Wilson in attendance upon the Court for cross-examination by the appellant when the books and records which he had identified should be by the government offered in evidence, and in excusing the said witness from further attendance upon the Court over the objection and exception of the appellant?

VI.

Did the Court err in receiving over appellant's objections testimony of the government witness E. P. Hair on rebuttal concerning transactions between the Union Reserve Life Insurance Company and Marquis, Cornes & Marquis and J. Elmer Johnson?

VII.

Did the Court err in denying appellant's motions for directed verdict, made at the close of the Government's case and at the close of the whole case?

VIII.

Did the Court err in instructing the jury and in refusing appellant's requested instructions?

IX.

Did the Court err in refusing to strike from the testimony the exhibits admitted in evidence on behalf of the Government?

BRIEF OF ARGUMENT

I.

The indictment under review, and particularly the sixth count thereof, is fatally defective because it is vague, uncertain and indefinite and incomplete and does not state facts sufficient to constitute the offense described in Section 37 of the Criminal Code (U.S.C.A. Title 18, Section 88).

(a) It is essential to the validity of an indictment for conspiracy that it allege the object of the conspiracy and the time at which it is charged it was formed, definitely and completely. (Assignments of Error No. I. 158).

The Assignment of Error discussed under this part of the argument is directed entirely at the indictment and sets out particularly that said indictment does not state facts sufficient to constitute any offense against the United States or the laws thereof; that it does not state any fact sufficient to constitute the offense described in Section 38 of the Criminal Code, (18 U.S.C.A. Sec. 88); that it does not state facts sufficient to consti-

tute any scheme or artifice to defraud or to obtain money and property by means of false representations; that it does not constitute facts sufficient to constitute conspiracy; that it is duplicitous; that it does not apprise the defendant of the evidence or evidences with which he is sought to be charged; that each count thereof is vague, uncertain and indefinite to such an extent that a trial under this indictment would be no protection in the event of another prosecution for the same offense or offenses sought to be charged; that it does not apprise the defendant of what participation he had in the use of the mails; that it does not inform the defendant as to what acts of his were fraudulent, false, illegal or wrongful; that it does not apprise the defendant whether he is charged with devising or intending to devise more than one scheme to defraud. (See Appendix for Assignment of Error in full, pp. 75-79)

IS THE INDICTMENT FATALLY DEFECTIVE?

It is the contention of the defendant Earl Canning that the Court erred in overruling this defendant's demurrer to the indictment. It will be noted, in examining the indictment, that the charges set forth in the First Count are incorporated by reference in each of the other five counts. In order, then, to analyze the indictment it is necessary to examine particularly the charges in the First Count. Two things are necessary to be alleged in order to charge a criminal offense: First, the formation of a scheme or device to defraud; Second, the use of the mails in carrying out that scheme or device.

It is a well settled rule of law that nothing is taken by intendment in an indictment. The indictment must

fairly state the essential of the offense sought to be charged in such way as to apprise the defendant of what he must be prepared to meet. Clearly the indictment in the instant case does not do this. The charging part of the indictment, in so far as the formation of the scheme or device to defraud is concerned, reads as follows:

> "That said defendants, on or about December 9, 1929, would, together with other persons not herein named as defendants, organize and incorporate, and cause to be organized and incorporated, under the laws of the State of Arizona, a corporation known as State Securities Corporation, hereinafter referred to as 'the Corporation', for the alleged purpose of selling stocks and bonds to raise money to purchase or establish a life insurance company, namely, the Union Reserve Life Insurance Company, hereinafter referred to as 'the Insurance Company', the capital stock of said corporation being represented by 250,000 shares of stock of no par value;
>
> "That as a part of said scheme and artifice, said defendants would secure for themselves and the other incorporators 50,000 shares of the capital stock of said corporation, for the purpose of reselling the same, or a large part thereof, to the persons to be defrauded, and to retain the proceeds of such sales for the sole benefit of said defendants;
>
> "It was further a part of said scheme and artifice that said defendants would sell to any and all of said persons to be defrauded, whom they could induce to purchase said shares and send and pay their moneys and properties to said defendants, by mak-

ing false and fraudulent pretenses, representations and promises concerning the value of said stock and concerning the payment of dividends to the shareholders thereof, and by making false and fraudulent pretenses, representations and promises that dividends upon said stock had been voted by the Board of Directors of said corporation, and by making other false and fraudulent pretenses, representations and promises in this indictment hereinafter alleged and set forth;

"It was further part of said scheme and artifice to have the State Securities Corporation purchase and obtain control of the Insurance Company, for the purpose of aiding said defendants in the sale of stocks and bonds of said Corporation to the persons to be defrauded by means of false and fraudulent pretenses, representations and promises;

"It was further a part of said scheme and artifice that after having sold bonds of the Corporation to the persons to be defrauded, they would, by false and fraudulent pretenses, representations and promises, induce the holders of said bonds to exchange said bonds for shares of the capital stock of said Corporation."

It will be noted, in the allegations of the indictment above set forth, that the charge is that defendants *would* do the things therein set out. There is nothing in the allegation or charge in the indictment anywhere that the defendants actually proceeded to do the things that it is charged they *would* do. It is charged that the de-

fendants agreed they *would* incorporate a corporation known as State Securities Corporation for the alleged purpose of selling stocks and bonds to raise money to purchase or establish a life insurance company known as Union Reserve Life Insurance Company. No charge is made that the said State Securities Corporation ever was incorporated, and no charge is made that the Union Reserve Life Insurance Company ever was organized or acquired by the defendants. It is charged that the defendants *would* secure for themselves and other incorporators fifty thousand shares of the capital stock of said State Securities Corporation for the purpose of reselling same and retaining the proceeds, but there is no charge in the indictment that these defendants or either of them ever did secure for themselves or any person or persons the fifty thousand shares of the capital stock mentioned therein. It is charged in the indictment that the defendants *would* sell said shares by making false and fraudulent pretenses, representations and promises, but nowhere in the indictment is it charged that the defendants or any of them ever sold any of said stock to any person or persons. It is further charged that defendants *would* have the State Securities Corporation purchase and obtain control of the insurance company for the purpose of aiding said defendants in the sale of stocks and bonds of the corporation to the persons to be defrauded but there is no charge in said indictment that said State Securities Corporation ever did purchase and obtain control of the insurance company. It is further charged that the defendants *would,* after having sold the bonds of the corporation to the persons to be defrauded, by false and fraudulent pretenses, representations and promises induce the holders of said bonds to exchange

said bonds for shares of the capital stock of said corporation, but nowhere in said indictment is it ever charged that the defendants, or any of them, ever caused any bonds to be issued by said corporation, or ever induced or tried to induce the holders of any of said bonds to exchange said bonds for shares of stock in the corporation.

It is hard to understand, in reading the entire indictment, how the specific things charged as having been done by the defendants can be based on the premise that the defendants did do the things which it is charged that they agreed they *would* do.

Nowhere in the indictment is there any charge as to the manner in which any person was to be defrauded. So far as the indictment is concerned there is no allegation or charge in the indictment which could in any manner support a conviction if the indictment was for obtaining money or property by false and fraudulent representations.

While it is understood that the gist of the offense is the using of the mails in furtherance of the scheme to defraud, yet there must be a sufficient allegation or charge in the indictment to permit proof that such scheme was formed and that it was calculated to defraud, and intended to be used for the purpose of defrauding, before the use of the mails in furtherance of such scheme becomes a criminal offense.

It is also clear, from a reading of the charges in the indictment, that more than one scheme or device is attempted to be charged. It is attempted to be charged in

the indictment that one of the schemes was to organize the State Securities Corporation and procure the issuance of fifty thousand shares of its capital stock to the defendants for the purpose of selling same, and the other scheme charged is to procure, either by purchase or organization, the Union Reserve Life Insurance Company for the purpose of using it to defraud. Clearly, an indictment based on two separate schemes is demurrable.

U. S. v. Siebrecht, 59 Fed. (2d) 976 (CCA 2 1932);

Shelton v. U. S., 67 Fed (2d) 388 (CCA 5, 1933);

Terry v. U. S., 7 Fed. (2d) 28 (CCA 9, 1925);

U. S. v. Ball, 294 Fed. 750 (DCMD Pa. 1924);

McLendon v. U. S., 2 Fed. (2d) 660;

Benham v. U. S., 7 Fed (2d) 271 (CCA 6 1925);

U. S. v. Brown, 79 Fed. (2d) 321 (CCA 2 1935);

U. S. v. McNamara, 91 Fed. (2d) 986 (CCA 2 1937);

Collins v. U. S., 253 Fed. 609, (CCA 9);

Beck v. U. S. 33 Fed. (2d) 107, 109, (CCA 8);

U. S. v. Halsey, Stuart & Co., 4 F. Supp. 662;

U. S. v. Smith, 29 Fed. (2d) 926, 928;

Pelz v. U. S., 54 Fed. (2d) 1001, 1005, (CCA 2);

Colburn v. U. S., 259 Fed. 371, (CCA 8), cert. denied, 251 U. S. 556;

18 *U. S. C. A.* sec. 338;

Norton v. U. S. 92 Fed. (2d) 753, (CCA 9).

II.

The Court in overruling the objections of the appellant to the Bill of Particulars, as furnished by the government, and in denying appellant's request for a further Bill of Particulars, abused sound judicial discretion to the prejudice of appellant. (Assignments of error II, 162).

Assignment of Error No. II, discussed under this part of the argument, deals with the failure of the Government to furnish this defendant a complete Bill of Particulars, and the overruling of the motion by defendant for a more particular Bill of Particulars, for the reason that the purported Bill of Particulars furnished was evasive, indefinite and incomplete, constitute conclusions of law, and did not fully and fairly disclose the information to which this defendant appellant was entitled. (See Appendix for Assignment of Error in full, pp. 79-81).

DID THE COURT ERR IN OVERRULING THE OBJECTIONS OF THE APPELLANT TO THE BILL OF PARTICULARS AS FURNISHED BY THE GOVERNMENT AND IN DENYING APPELLANT'S REQUEST FOR A FURTHER BILL OF PARTICULARS?

The defendant Canning demanded from the United States Government a Bill of Particulars concerning the allegations of the indictment, and in said demand specified forty-nine different items on which the defendant claimed he was entitled to have more information than was set out in the indictment, in order to properly prepare his defense. In response to that demand the United States District Attorney furnished a so-called purported

Bill of Particulars, which this defendant contends did not contain the information in possession of the United States and which the defendant was entitled to have before requiring him to plead to said indictment and before being required to make his defense. This defendant filed his objections to the so-called Bill of Particulars furnished and asked the Court to make an order requiring the government to supplement the purported Bill of Particulars and to give to the defendant the information which the government had and which was necessary for the defendant's defense and to which the defendant was entitled. This demand was by the Court denied, and this defendant duly excepted to the ruling of the Court in overruling this defendant's demand for a supplemental Bill of Particulars.

In examining the Bill of Particulars furnished by the government, it will be noted that paragraphs I, II, III, IV, V, IX, X, XIV, XVII, XVIII, XIX, XX, XXI. XXII, XXIII, XXIV, XXV, XXVI, XXVII, and XXVIII of the purported Bill of Particulars furnished to the defendant are severally and separately evasive, indefinite, uncertain and incomplete and constitute conclusions of law, and do not fully or fairly disclose the information sought by this defendant; that the answers to the demands set up in this demand for a supplemental Bill of Particulars are not answers which disclose to this defendant the facts relied upon by the government in charging or proving the allegations or charges in the indictment.

Paragraphs VI, VII, VIII, IX, XI, XIII, XIV, XV, XXXIX, XLIV, XLVI, XLVII, XLVIIII of the purported Bill of Particulars severally and separ-

ately are evasive, indefinite, uncertain and incomplete, and constitute conclusion of law, and do not fairly disclose the information requested by this defendant, and do not give to this defendant the information in possession of the government, upon which the government relied to prove the charges in the indictment.

That in answer to the demand made in paragraph 49 of defendant's demand for Bill of Particular's, which answer is set forth in paragraph XLIX of the government's purported Bill of Particulars, having particular reference to the financial statement in paragraph numbered 5 of the sixth count of the indictment and the financial statement referred to in paragraph numbered 3 of the sixth count of the indictment, it appears from paragraph XLIX of the purported Bill of Particulars filed by the government that said financial statements are not identical and the difference between the two is not fairly and fully disclosed by the government's Bill of Particulars as filed.

In answer to paragraph 8 of this defendant's demand for Bill of Particulars, which is as follows, "To whom were any such false, fraudulent or misleading representations, pretenses or promises made?", the government in its purported Bill of Particulars answered as follows: "In reply to paragraph 8, such false, fraudulent and misleading representations, pretenses and promises were made to the public generally, to the stockholders and bondholders of the corporation, and the policy holders of the insurance company, to the Corporation Commission of the State of Arizona, and to Dunne's Insurance Reports, Louisville, Kentucky." In this answer, for

the first time, it is claimed that the reports to the Corporation Commission of the State of Arizona and to Dunne's Insurance Reports were false, fraudulent and misleading, and in order to properly prepare his defense to the indictment it was necessary that this defendant be furnished by the government a supplemental Bill of Particulars containing copies of the written reports to the Corporation Commission of the State of Arizona and to Dunne's Insurance Reports, Louisville, Kentucky which are claimed to have been false, fraudulent and misleading.

It is so well settled that the defendant is entitled to a complete Bill of Particulars when the charges in the indictment are not sufficient to apprise him of what he must meet at the trial of the case, and that the Court should order and require a Bill of Particulars to be furnished, an extensive argument of this assignment of error is not deemed necessary.

Collins v. U. S. (CCA 9) 253 Fed. 609;

Case v. U. S. (CCA 9) 6 Fed. (2d) 530;

Perez v. U. S. (CCA 9) 10 Fed. (2d) 352, 353;

Beck v. U. S. (CCA 8) 33 Fed. (2d) 107;

Durland v. U. S. 161 U. S. 306, 314-5;

U. S. v. Halsey, Stuart & Co. 4 F. Supp. 662;

U. S. v. Grove (D. C.) 12 F. Supp. 372;

U. S. v. Nat. Title Guar. Co. (D. C.) 12 F. Supp. 473;

Shreeve v. U. S. 77 Fed. (2d) 2.

III.

Evidence of acts and declarations of alleged co-conspirators were not admissible against appellant because,

(a) There was no evidence that the appellant entered into any conspiracy.

(b) There was no evidence that appellant had any knowledge of such acts and declarations, either before or subsequent thereto.

(c) As to him, such evidence was pure hearsay. (Assignments of Error X, XI, XII, XXXIV, XXXV, XXXVI, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVI, XLVII, XLVIII, XLIX, L, LI, LII, LIV, LV, LVI, LVII, LVIII, LXI, LXII, LXIII, LXV, LXXI, LXXIII) (170, 171, 172, 173, 174, 175, 177, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 200, 201, 202, 203, 204, 207, 210, 213).

The Assignments of Error dealt with under this subdivision of the argument have to do with the admission of acts and declarations of the alleged co-conspirators against this defendant, over his objection; it deals with the minutes of the meetings of the board of directors of Union Reserve Life Insurance Company, with the minutes of the meetings of the executive committee and meetings of stockholders of Union Reserve Life Insurance Company, of carbon copies of certain letters addressed to George H. Cornes, of minutes of meetings of stockholders of State Securities Corporation, minutes of meetings of the executive committee of State Securities Corporation, an envelope and contents addressed

to Mrs. W. H. Etz, conversations between Helen G. Etz, E. G. Hamilton, and R. F. Marquis, business card of E. G. Hamilton, a certain envelope and contents thereof addressed to W. H. and Mrs. Helen G. Etz, a certain receipt signed by E. G. Hamilton, portions of the records of the First National Bank of Arizona, carbon copies of letters addressed to Insurance Index, letter and enclosures addressed to H. F. Link, letter addressed to Gerald Palmer, purported conversations between Bill Etz, his wife, his father and his mother, a stamped envelope and contents addressed to May E. Bonar, a letter and envelope addressed to May E. Bonar, a certificate for shares of the capital stock of State Securities Corporation issued to L. Jo Hall, a letter with envelope addressed to H. E. Simmons, carbon copy of letter addressed to May E. Bonar. (See Appendix for Assignments of Error in full, pp. 81-101).

DID THE COURT ERR IN ADMITTING AS AGAINST THIS APPELLANT EVIDENCE OF ACTS AND DECLARATIONS OF ALLEGED CO-CONSPIRATORS IN THE ABSENCE OF ANY SUFFICIENT EVIDENCE THAT APPELLANT DID ENTER INTO ANY CONSPIRACY AND IN THE ABSENCE OF ANY EVIDENCE THAT APPELLANT HAD ANY KNOWLEDGE OF SUCH ACTS AND DECLARATIONS?

In presenting this question we state the well established principal of law, as follows:

> "In order that the acts or declarations of an alleged conspirator may be admissible against an alleged co-conspirator the existence of the conspiracy

must be shown; it also must be shown that the defendant against whom the evidence is offered was a party to such conspiracy. The fact that the indictment charges a conspiracy does not dispense with the necessity of proof of the existence of such conspiracy in order to render the acts or declarations of one conspirator admissible against another."

In discussing this phase of the case, it naturally falls into two classifications:

The first classification, covered by Assignments of Error X, XI, XII, XXXIX, XL, XLI, XLII, XLIII, LXIII and LXV (170, 171, 172, 173, 174, 175, 176, 177, 191, 192, 193, 194, 204, 207) has to do with the introduction in evidence of minutes of the meetings of the board of directors, stockholders and executive committee of Union Reserve Life Insurance Company, and of the minutes of the meetings of the board of directors, stockholders and executive committee of State Securities Corporation;

The second classification has to do with the incorporation in evidence of letters purported to have been written by some of the defendants, not the defendant Canning, and with conversations and statements alleged to have been made by some of the defendants, not the defendant appellant, as set out in Assignments of Error XXXIV, XXXV, XXXVI, XXXVII, XXXVIII, XLIV, XLV, XLVI, XLVII, XLVIII, XLIX, L, LI, LII, LIV, LV, LVI, LVII, LVIII, LXI, LXII, LXXI, LXXII (189, 190, 191, 194, 195, 196, 197, 198, 200, 201, 203, 204, 210, 211, 212, 213.)

Under the rule of law above set forth, it is the contention of defendant Canning that there is no evidence in the record establishing any conspiracy so far as appellant is concerned, but, on the contrary, the evidence and the weight of the evidence shows clearly that there was no conspiracy so far as appellant is concerned.

It is shown by the evidence (259, 372, 373) that prior and at the time of the incorporation of State Securities Corporation this defendant had nothing whatever to do with the affairs of the corporation, was not an incorporator, and was not in any wise connected with the company or the individuals who were stockholders, some of whom are defendants in this case. The record shows that State Securities Corporation filed its articles of incorporation in the office of the Arizona Corporation Commission on December 6, 1929, and certificate of incorporation was issued by the Corporation Commission on the 9th day of December, 1929 (245, 246). The indictment charges that the scheme and artifice to defraud was formed on or about December 9, 1929 (3).

The testimony of Ora T. Hill, who was the bookkeeper for Union Reserve Life Insurance Company from 1929 to March, 1938, sets forth particularly what Earl Canning had to do with the two corporations (327, 328, 330, 331):

> The Witness: Earl Canning was never regularly employed as a bookkeeper of the Union Reserve Life Insurance Company. He was an accountant who came in occasionally to help make financial statements. He made them from the entries in the book by me and King Wilson. I assisted Mr. Canning in

making the annual statements for Union Reserve Life Insurance Company, Government's Exhibit No. 7 in evidence. For the year 1936, Mr. Canning made the portion of the statement shown as income and disbursements, page 2 and 3 and 4. He made up the liabilities with the exception of the reserves. King Wilson calculated the reserves. Mr. Canning prepared pages 2, 3 and 4 and 5. I helped him and the figures were taken from the books of the Union Reserve Life Insurance Company which were kept by me and King Wilson. The same thing is true for the year 1933, 1934 and 1935. I assisted in the preparation of the 1936 report. The figures on that statement were taken from books kept by me and King Wilson. I assisted Mr. Canning in the preparation of the statement for 1934. Those figures were taken from the books of the Union Reserve Life Insurance Company, kept by me and King Wilson. I assisted Mr. Canning in the preparation of the statement for 1933. It was taken from the books of the Union Reserve Life Insurance Company kept by me and King Wilson. Each statement correctly reflects the books of the company. Mr. Canning posted the figures in one of the ledgers of the Union Reserve Life Insurance Company from the cash book in 1937. The items he posted were taken from the cash journal kept by me and King Wilson. So far as I know the items he posted in that ledger were carefully taken from that cash journal. Earl Canning was never a stockholder, officer or director in either the Union Reserve Life Insurance Company or State Securities Corporation. He had no part in the management or policies of the Union

Reserve Life Insurance Company or in the management of the State Securities Corporation. (327, 328)

The Witness: I do not have any knowledge of any activity of Earl Canning in connection with either of these companies or any of these defendants except that he occasionally came over and made the financial statements from the books kept by me and King Wilson. I did all of this work under the direction of R. F. Marquis. (330, 331)

From all of the testimony in this case it is apparent that the only connection the appellant ever had with either of these companies was as an employee, and that he was paid by the hour for his work (730, 731, 732, 733, 734):

The Witness: My name is Earl Canning. I am one of the defendants. I am fifty-three years old and live at 768 East Willetta, Phoenix. I have lived in Phoenix about forty-five years. I started to school here in the first grade. I went through the grammar and high school. The last year of high school I worked a half day and went to school a half day. Since I finished high school I worked for the Arizona Water Company which operated the canals before the United States Government took them over. Then I got a job at the capitol as assistant public examiner under W. C. Forster. Then I went to work for E. E. Pascall in a real estate office. I tried railroad work for three months and a half. Then came back to Phoenix, went to work for McArthur Brothers, then went to Globe and worked for W. I. Putman, came back to Phoenix, went to work for Green

and Griffin, the Home Builders. I became a bookkeeper, then an assistant secretary, then went to work as a public accountant in 1923. Worked as a public accountant until 1933, then became a certified public accountant and have been engaged in business for myself since 1923. I was never a stockholder, officer or director in either the State Securities Corporation or Union Reserve Life Insurance Company, I had nothing to do with the policy, management or control of either company. I never sold or attempted to sell any stock, bonds or insurance in either company. I did some accounting work for both companies. I started in 1930 and worked for them some until they were in the hands of the receiver and quit. I kept a record of the time I put in and the work I did for these companies.

Thereupon certain books were marked defendant's Exhibit AL for identification.

The Witness: These books are the diaries in which I kept the various hours that I worked. They are for the years 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937 and 1938. My arrangement for pay was $2.00 per hour until 1935. From 1935 I think I received $3.00 an hour.

Thereupon a document was marked Defendant's Exhibit AM for identification.

The Witness: The defendant's Exhibit AM for identification is a schedule showing the number of hours I worked each year and the pay received. It is a compilation of the time shown in these books, Exhibit AL for identification. I made it from the books and it clearly reflects the time shown in the books. It shows the total hours I worked during these years and the total amount I was to be paid and the total amount I was paid.

Thereupon Defendant's Exhibit AM for identification was offered in evidence and Defendant's Exhibit AM for identification was received in evidence as Defendant's Exhibit AM in evidence, which abstracted to the issue is:

DEFENDANT'S EXHIBIT NO. AM

ACCOUNTANT'S FEE RECEIVED BY EARL CANNING

State Securities Corporation and Union Reserve Life Ins. Co.

Year 1930 hours	234¾		
" 1931 hours	262½		
" 1932 hours	244¾		
" 1933 hours	317½		
" 1934 hours	596		
Total hours @ $2.00	1655½	$3,311.00	
Amount paid			$2,743.55
Year 1935 hours	461		
" 1936 hours	157¼		
" 1937 hours	206		
" 1938 hours	99½		
Total hours @ $3.00	923¾	$2,771.25	
Amount paid			2,880.00
Total earnings		6,082.25	
Amount paid			5,623.55
Balance Unpaid		458.70	

Earl Canning Audit Company—Phoenix-Prescott
Certified Public Accountant

The Witness: The total number of hours I put in at $2.00 per hour is 1655½ for the years 1930,

1931, 1932, 1933 and 1934. This amounted to $3311.00. They paid me during that time $2743.55. I put in 923¾ hours at $3.00 per hour, which amounted to $2771.25, making a total amount of $6082.25. I have been paid $5623.55, and they still owe me $458.70. I assisted in preparing page 2, page 3 and page 5 of Government's Exhibit 7 in evidence. I did not assist in preparing any other part of report (730, 731, 732, 733, 734).

In addition to the above testimony as to appellant's connection with the two corporations, the testimony of appellant on cross examination (743 to 773 inclusive) sets out in detail everything which appellant had to do with the two corporations.

As to the correctness of the work of appellant, the Court's attention is respectfully called to the testimony of the Government's witness, E. P. Hair (637, 638) where the witness says:

"I never did understand the basis for that, Government's Exhibit No. 33 in evidence, the annual report of the Union Reserve Life Insurance Company as of December 31, 1936. The cash and other items in that statement correctly reflects what appears in the books of the company in the ledger and cash journals. The item of $7150 Home Owners Loan Bonds is in the ledger of the Union Reserve Life Insurance Company. The increase in mortgages in the amount of $11,000 are reflected in the ledger of the Union Reserve Life Insurance Company. The statement in all its aspects clearly reflects the cash

books and the ledger of the Union Reserve Life Insurance Company."

Clearly under the testimony in this case, both from the Government's witnesses and the witnesses for the defense, there was nothing to show that the appellant was a party to any conspiracy, if any conspiracy did in fact exist. Neither is there any evidence in the record anywhere that this appellant had any knowledge of any of the things set forth in the Assignments of Error, either before or subsequent thereto.

16 *C. J.* 647, sec. 1287;

Minner v. U. S. (CCA 10 1932) 57 Fed. (2d) 506;

Scheib v. U. S. (CCA 7 1926) 14 Fed. (2d) 75;

Ridenour v. U. S. (CCA 7 1926) 14 Fed. (2d) 888;

Mayold v. U. S. (CCA 9 1934) 71 Fed. (2d) 65.

It being evident, therefore, from the evidence, that there was no proof that appellant entered into any conspiracy as set out and charged in the indictment, if any conspiracy in fact existed, or had any knowledge of such acts and declarations, the Court clearly erred in admitting in evidence against the appellant Government's Exhibit No. 27A (288, 289, 290), Government's Exhibit No. 27B (291, 292), Government's Exhibit No. 27C (293, 294, 295), Government's Exhibit No. 40 (342, 343, 344, 345), Government's Exhibit No. 42 (356, 357, 358), Government's Exhibit No. 43 (359, 360, 361, 362, 363, 364), Government's Exhibit No. 44 (365, 366, 367), Government's Exhibit No. 46 (378, 379, 380), Government's Exhibit No. 47 (381, 382, 383, 384, 385),

Government's Exhibit No. 27D (387, 388, 389), Government's Exhibit No. 27E (391, 392, 393), Government's Exhibit No. 26A (394, 395, 396), Government's Exhibit No. 26B (398, 399), Government's Exhibit No. 26C (401, 402), Government's Exhibit No. 45 (413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426), Government's Exhibit No. 50 (435), Government's Exhibit No. 35 (437, 438, 439), Government's Exhibit No. 51, (440), Government's Exhibit No. 52 (448, 449, 450, 451, 452, 453, 454), Government's Exhibit No. 53 (455, 456), Government's Exhibit No. 48A (458), Government's Exhibit No. 54 (460, 461), Government's Exhibit No. 34 (466, 467), Government's Exhibit No. 31 (473, 474, 475), Government's Exhibit No. 33, (481), Government's Exhibit No. 41 (482, 483, 484), Government's Exhibit No. 36 (489, 490, 491, 492, 493, 494), Government's Exhibit No. 56 (501, 502, 503, 504, 505, 506, 507, 508, 509), Government's Exhibit No. 57 (513, 514, 515), Government's Exhibit No. 58 (515), Government's Exhibit No. 32 (525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540), Government's Exhibit No. 62 (543, 544, 545), a part of Government's Exhibit No. 26 (545, 546, 547), Government's Exhibit No. 26D (547), Government's Exhibit No. 26E (548, 549), Government's Exhibit No. 26F (549, 550), Government's Exhibit No. 26H (553, 554, 555), Government's Exhibit No. 26I (555, 556, 557, 558), Government's Exhibit No. 26J (559, 560), Government's Exhibit No. 26K (560, 561), Government's Exhibit No. 26L (561, 562, 563, 564) Government's Exhibit No. 26L-1 (565, 566), Government's Exhibit No. 26M (566, 567, 568, 569), Government's Exhibit No. 26N (570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580,

581, 582, 583, 584), Government's Exhibit No. 26O (585, 586), Government's Exhibit No. 26P (586, 587), Government's Exhibit No. 26Q (587, 588, 589), Government's Exhibit No. 26R (589, 590), Government's Exhibit No. 26S (590, 591), Government's Exhibit No. 26T (591, 592), Government's Exhibit No. 26U (593, 594, 595, 596, 597), Government's Exhibit No. 26V (597, 598, 599, 600, 601, 602, 603), Government's Exhibit No. 26W (603, 604, 605, 606, 607, 608), Government's Exhibit No. 26Y (608, 609, 610, 611, 612, 613), Government's Exhibit No. 63 (618).

Wallace v. U. S. 245 Pac. 300;

U. S. v. Babcock, 3 Dillon 581;

Miller v. U. S. 133 Fed. 337;

Pope v. U. S. 289 Fed. 312.

IV.

Many of the books, records, cancelled checks, and check stubs received in evidence were not admissible in evidence for the reasons set forth under proposition III above, and for the further reason that no materiality was pointed out when such books and records were offered. There was no proof that such books and records and the entries therein were kept in the regular course of business. There was no proof that it was the regular course of business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter, and there was no compliance with the requirements of Section 695, Title 28 USCA, and as construed by the District Court this section is unconsti-

tutional. (Assignments of Error III, IV, V, VI, VIII, XIII, XIV, XV, XVI, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV,XXVI, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, LIX, LXVII) (165, 166, 167, 168, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 202, 208).

The Assignments of Error dealt with in this phase of the argument covers the exceptions to the admission in evidence by the Court of all of the various books and records of the Union Reserve Life Insurance Company and the State Securities Corporation, consisting of cash books, ledgers, journals, cancelled checks, check stubs, minute books, receipts, work sheets made by Government's witness Hair, and other documents and records introduced in evidence over the objection of this appellant. (See Appendix for Assignments of Error in Full, pp. 101-116)

DID THE COURT ERR IN ADMITTING IN EVIDENCE BOOKS, RECORDS AND CANCELLED CHECKS AND CHECK STUBS FOR THE FURTHER REASON THAT NO MATERIALITY WAS SHOWN AND THERE WAS NO PROOF THAT SUCH BOOKS AND RECORDS AND THE ENTRIES THEREIN WERE KEPT IN THE REGULAR COURSE OF BUSINESS, AND NO COMPLIANCE WITH THE REQUIREMENTS OF SECTION 695, TITLE 28, U.S.C.A. AND FOR THE REASON THAT AS CONSTRUED BY THE DISTRICT COURT SAID SECTION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SIXTH AMEND-

MENT TO THE CONSTITUTION OF THE UNITED STATES?

In presenting this question to the Court we realize that under proper proof books of account and record are admissible in evidence in criminal cases. However, certain rules exist which must be strictly followed before such books and records may be admitted in evidence against one who did not make the entries in the books or did not make the records. This rule is concisely stated in 16 C. J. 743, sec. 1527, and is as follows:

> "The rule that entries made by a third person in the regular course of business contemporaneously with the transaction which they record are competent evidence of the facts shown thereby, when the person making the entries has personal knowledge of the subject, or when information respecting it is regularly reported to him, *and when the correctness of the entries is verified by the oath of the person who made them.*"

In discussing this question it must also be kept in mind that the same rule also applies to the objection to the introduction of exhibits mentioned in the foregoing assignments of error that was applied and was discussed in the question as to the admissibility of acts and declarations of alleged co-conspirators where no proof of a conspiracy is had and where it is not shown that the appellant had any knowledge of the acts and declarations of the alleged co-conspirators.

It is contended by the appellant that the Court in the instant case did not properly apply the rule as laid down

in Section 695, Title 28, U. S. C. A. relative to the introduction of books and records, that such misconstruction and misappliance of the statute resulted and does result in making the act unconstitutional, because it is violative of the sixth amendment to the Constitution of the United States, in that it permits the introduction of evidence against the defendant by witnesses with whom he is not confronted and witnesses whom he is not afforded an opportunity to cross-examine.

It has always been the law in the United States and in the various states, that in criminal cases the Government or a state could not present any testimony against a defendant except it be the testimony of a witness present in court, under oath, on the witness stand, and subject to examination by the defendant. Even in the introduction of official records there must be evidence that the record is the official record, one required to be kept under the law, and the record must be properly identified as being the record kept under such law.

In the instant case there was no attempt on the part of the Government to fully comply with this rule of law. An examination of the transcript of record indicates that many, if not all, of the exhibits complained of in the above assignments of error were in part made by some person who was not present in court to identify the entries, or a portion of the record not made by the person testifying. The evidence shows that so far as this appellant is concerned, he had little, if anything, to do with the making of any of the books or records introduced in evidence, and yet they were introduced against him in an effort to prove the commission of a criminal

offense, and, based on such books and records, he was convicted on the sixth count of the indictment.

It is the further contention of this appellant that, in so far as this appeal is concerned, all of the books and records complained of and introduced in evidence against this defendant were improperly submitted to the consideration of the jury and should not have been considered by the jury against this appellant, because the jury acquitted him on the first five counts in the indictment and by such acquittal found that he did not have any part in the scheme or device to defraud, that he did not have any part in the doing of any of the things set forth in the first five counts in the indictment and having so decided by their verdict of not guilty and having acquitted this defendant of all of such acts, the jury could not then have found this defendant guilty on the sixth count.

It will be noted from the testimony of Willis G. Ethel (245 to 260 inclusive) that no attempt was made to show by any witness that the documents were such as were entitled to be admitted in evidence against this defendant. The method used by counsel for the Government in identifying these purported records is best shown by the following excerpt from the testimony of Willis G. Ethel (249), which is as follows:

> Thereupon counsel for plaintiff asked that a bundle of papers be marked as one exhibit and said bundle was marked Government's Exhibit No. 5 for identification. The Witness Ethel was then shown Government's Exhibit No. 5 for identification, consisting of several documents and testified as fol-

> lows: These documents are the records of the Corporation Commission in reference to the State Securities Corporation.

Nowhere in the testimony is there any showing by any witness that these records were public records, required to be kept by the Corporation Commission; there was no showing as to who made the records; there was no showing as to whether or not some of the records were made by the Corporation Commission or by some individual in no way connected with Corporation Commission, but a bundle of papers was handed the witness with the above identification being the only identification made of said papers, and thus Government's Exhibit No. 5 was admitted in evidence over the objection of this defendant.

An examination of the record shows that this was the procedure following in most instances where exhibits were intrduced. In some instances the record was presented to a witness who kept only a portion of the record and had no knowledge of who kept the other portions and had no knowledge as to whether the records were kept in the regular course of business or made in some other manner; there was no evidence that the person making the record knew that the transactions were correct or that they were correctly entered in the records.

As to one witness, King Wilson, who identified Exhibits 8, 9, 10, 11, 12 and 14 (261, 262, 263, 264, 265, 266), only one of which exhibits was offered in evidence during the time said witness was on the stand and available for cross-examination, the Court refused to keep

said witness in the jurisdiction of the Court where he could be cross-examined by the defendant when such exhibits were offered in evidence, although the United States attorney objected to the cross-examination of this witness on exhibits not in evidence (261 to 277 inclusive), and the Court later permitted the introduction in evidence of said exhibits over the objection of this defendant.

It is clear, therefore, from the law and the evidence, that the Court erred in admitting in evidence the exhibits mentioned in the appellant's assignments of error.

For the convenience of the Court, the pages in the transcript of record showing the identification of the exhibits and the exhibits themselves are grouped:

Government's Exhibit No. 5 (249, 250, 251, 252),
Government's Exhibit No. 6 (252, 253, 254, 255, 256),
Government's Exhibit No. 12 (265, 266, 267),
Government's Exhibit No. 8 (296),
Government's Exhibit No. 28 (297),
Government's Exhibit No. 11 (299),
Government's Exhibit No. 10 (300),
Government's Exhibit No. 7 (305),
Government's Exhibit No. 29 (306),
Government's Exhibit No. 30 (307),
Government's Exhibit No. 14 (309),
Government's Exhibit No. 17 (310),
Government's Exhibit No. 15 (311),
Government's Exhibit No. 19 (312),
Government's Exhibit No. 22 (313),
Government's Exhibit No. 24 (315),
Government's Exhibit No. 18 (350),

Government's Exhibit No. 21 (352),
Government's Exhibit No. 23 (353),
Government's Exhibit No. 57 (513),
Government's Exhibit No. 58 (515).

V.

The Court erred in refusing to keep the Government's witness King Wilson in attendance upon the Court for cross-examination by the appellant when the books and records which he had identified should be by the Government offered in evidence, and in excusing him from further attendance upon the Court over the objection and exception of appellant. (Assignment of Error No. IX 169, 170).

ASSIGNMENT OF ERROR NO. IX

The Court erred in refusing to keep the Government's witness King Wilson in the jurisdiction of the Court for cross-examination by the defendants when the books and records which he had identified should be by the Government offered in evidence, for the reason that at the time the Court excused the witness King Wilson he had identified some seven Exhibits consisting of the books of account and records. The said books had not been offered in evidence and no materiality of any figure in the books, or the relevancy thereof had been pointed out, and this defendant appellant was entitled to cross-examine the said Government witness King Wilson as to any entries made by him in such books, and generally as to such books and his knowledge of the transactions therein reflected and claimed by the Government to be material, when the Government should point out the claimed materiality thereof,

or introduce the same in evidence, and in excusing said witness from attendance on the Court, to which ruling defendant appellant duly excepted. (169, 170)

DID THE COURT ERR IN REFUSING TO KEEP THE GOVERNMENT'S WITNESS KING WILSON IN ATTENDANCE UPON THE COURT FOR CROSS-EXAMINATION BY THE APPELLANT WHEN THE BOOKS AND RECORDS WHICH HE HAD IDENTIFIED SHOULD BE BY THE GOVERNMENT OFFERED IN EVIDENCE, AND IN EXCUSING THE SAID WITNESS FROM FURTHER ATTENDANCE UPON THE COURT OVER THE OBJECTION AND EXCEPTION OF THE APPELLANT?

In discussing this assignment of error the Court's attention is called to the entire testimony of the witness King Wilson (261 to 277). It will be noted that the witness said that he resided in Louisville, Kentucky. He then proceeded to identify portions of certain exhibits, being the books of account of the Union Reserve Life Insurance Company, being Exhibits 8, 9, 10, 12, 13, 14 and 15. During the time this witness was on the stand only one of said exhibits, Exhibit No. 12, was offered in evidence. At the close of the witness's testimony counsel for the Government announced that the witness was going to be excused so that he could leave and go back to his business in Louisville, Kentucky. Objection was made to permitting the witness to leave the jurisdiction of the Court until the exhibits identified by the witness were introduced in evidence so that the witness might be cross-examined as to said

exhibits. An attempt was made to ask the witness on cross-examination some of the questions relative to entries in one of the books (270, 271), and counsel for the Government objected because the book had not been introduced in evidence. Notwithstanding the objection of the defendant the Court refused to keep the witness within the jurisdiction of the Court and permitted him to be excused and leave the State of Arizona at that time.

This was clearly a violation of the sixth amendment to the Constitution of the United States which guarantees to the accused in a criminal case the right to be confronted with the witness against him.

The rule laid down by the courts as to the right of cross-examination is concisely stated in 70 C. J. 611, sec. 779, as follows:

> "A party has a right to cross-examine witnesses who have testified for the adverse party, and this right is absolute and not a mere privilege, and, unless subject to cross-examination, a witness cannot testify, *and it is not within the discretion of the court to say whether or not the right will be accorded;*"

The framers of the sixth amendment to the Constitution and the people of the United States who adopted it were vitally aware of the great need of a rule of law of this kind; in giving to the accused a right of trial by jury they also realized that the accused had a right to be confronted with the witness against him; that he should not be tried and convicted on hearsay testimony

because of the uncertainty of it, and that a defendant should have a right by cross-examination to determine everything that the witness knew about the transaction. The courts, from the time of the adoption of the sixth amendment, have been very zealous in enforcing its provisions. The reason for that has been amplified in many decisions of the United States supreme Court, as well as the state courts. In the case of *State v. Ritz,* 211 P. 298, 65 Mont. 180, 187, the court, speaking of the right of cross-examination, said:

> "Cross-examination is the most potent weapon known to the law for separating falsehood from truth, hearsay from actual knowledge, things imaginary from things real, opinion from fact, and inference from recollection, and for testing the intelligence, fairness, memory, truthfulness, accuracy, honesty, and power of observation of the witness. It has become a truism in the legal profession that 'The testimony of a witness is not stronger than it is made by his cross-examination.' "

And again, in speaking of the importance of preserving the right unimpaired, the court in the case of Prewitt v. State, 126 So. 824, 156 Miss. 731, said:

> "It is of the utmost importance in the administration of justice that the right of cross-examination be preserved unimpaired. It is the law's most useful weapon against fabrication and falsehood. As a test of accuracy, truthfulness, and credibility of testimony, there is no other means as effective."

In the instant case the trial court utterly disregarded the defendant's right of cross-examination, refused to

keep the witness within the jurisdiction of the court until the exhibits which he had identified had been admitted in evidence so that he might be cross-examined on said exhibits, arbitrarily at the instance of counsel for the government and over the objection of the defendants permitted the witness to leave the State of Arizona and return to Louisville, Kentucky. Later on the record shows that these exhibits were offered and introduced in evidence over the objection of the defendant and which objection again raised the question that defendant had been denied the right to cross-examine the witness who identified certain portions of the exhibits (296, 300, 299, 266, 302, 309, 311).

It is clear from the cases dealing with this question that the court has no discretion in the matter and the right of cross-examination being absolute, the Court committed reversible error when it refused to compel the attendance of the witness King Wilson until the exhibits identified by the witness were introduced in evidence, in order that the witness might be cross-examined and, again, the Court committed reversible error when it received in evidence over the objections of the defendant the exhibits identified by the witness King Wilson and about which the witness could not be cross-examined by the defendant.

Alford v. U. S. 51 S. Ct. 218, 282 U. S. 687, 75 Law Ed. 624;

Sossock v. U. S. 63 Fed. (2d) 511;

Minner v. U. S. 57 Fed. (2d) 506;

Gallaghan v. U. S. 299 Fed. 172;

Kirk v. U. S. 280 Fed. 506.

VI.

The action of the Court in overruling the appellant's objections to the testimony of witness E. P. Hair on rebuttal concerning transactions between the Union Reserve Life Insurance Company and Marquis, Cornes & Marquis and J. Elmer Johnson was clear and prejudicial error. (Assignments of Error LXIX, LXX, LXXI, 209, 210).

ASSIGNMENTS OF ERROR NO.
LXIX, LXX, LXXI.

Assignments of Error Nos. LXIX, LXX and LXXI (209, 210, 211) are objections to the testimony of the witness E. P. Hair, over the objection of the appellant Canning, concerning entries in books of Marquis, Cornes & Marquis and the Union Reserve Life Insurance Company, and transactions purportedly had with one J. Elmer Johnson, and the introduction of Government's Exhibit No. 68 and 69 in evidence, being a copy of a letter, and a work sheet made by witness E. P. Hair.

(See appendix for Assignments of Error in full pp. 116-118)

DID THE COURT ERR IN RECEIVING OVER APPELLANT'S OBJECTIONS TESTIMONY OF THE GOVERNMENT'S WITNESS E. P. HAIR ON REBUTTAL CONCERNING TRANSACTIONS BETWEEN THE UNION RESERVE LIFE INSURANCE COMPANY AND MARQUIS, CORNES & MARQUIS AND J. ELMER JOHNSON?

In what counsel for the government termed rebuttal testimony E. P. Hair was called on behalf of the government and, over the objection of the defendant, was per-

mitted to testify as to certain alleged transactions between one J. Elmer Johnson and the State Securities Corporation and the Union Reserve Life Insurance Company. (880 to 895) An examination of the testimony in this case fails to reveal that J. Elmer Johnson was a witness in the case, either for the Government or for the defense.

The testimony offered and given by the witness Hair was in no sense rebuttal testimony, because there had been no testimony on the part of any witness in the case as to J. Elmer Johnson. J. Elmer Johnson was not charged in the indictment with being a party to any of the alleged acts charged in said indictment nor in any count thereof.

An examination of this testimony clearly shows that it was not introduced in contradiction of any testimony in the case. For some reason counsel for the government conceived the idea that impeachment testimony should be introduced against J. Elmer Johnson. No attempt was made by counsel for the government to ask the witness Hair any questions contradictory of any statements made by any witness or introduced in evidence. Clearly it was an attempt by counsel for the government to inject extraneous matters into the record for the purpose of prejudicing defendant, and the Court committed error in not sustaining defendant's objection to this testimony, the right of rebuttal only existing as to testimony contradictory to testimony introduced by the opposite party in the examination of his witness.

16 C. J. 867, sec. 2185.

VII.

The appellant's motions for directed verdict of not guilty should have been granted. (Assignments of Error LXIV and LXXII (205, 206, 207, 211, 212, 213).

ASSIGNMENTS OF ERROR NO. LXIV, LXXII.

Assignments of Error No. LXIV and LXXII (205, 206, 207, 211, 212, 213) concern the motion of appellant for directed verdict at the close of the government's case and the motion of appellant for a directed verdict at the close of all of the testimony. (See Appendix for Assignments of Error in full, pp. 118-122)

DID THE COURT ERR IN DENYING APPELLANT'S MOTIONS FOR DIRECTED VERDICT, MADE AT THE CLOSE OF GOVERNMENT'S CASE AND AT THE CLOSE OF THE WHOLE CASE?

In presenting these Assignments of Error it is necessary to examine all of the evidence relative to the connection of the defendant Canning with the entire transaction in order to determine if there is sufficient evidence in the record to authorize or justify the Court in submitting the case to the jury on the charges set out in the indictment. In examining the testimony relative to this defendant we should keep in mind the rule that the Court should direct a verdict where there is no competent evidence reasonably tending to sustain the charge or where the evidence is insufficient to overcome the presumption of innocence or to show defendant's guilt beyond reasonable doubt.

The evidence in this case shows (259, 260) that this defendant was neither a stockholder, officer or director of the State Securities Corporation at the time the corporation was organized or at any time thereafter. The evidence also shows that the defendant Canning was never a stockholder, officer or director in the Union Reserve Life Insurance Company. And the undisputed evidence shows that he had nothing to do with the policy, management or control of either company; that he never sold or attempted to sell any stock, bonds or insurance in either company; that his employment with the State Securities Corporation commenced in 1930; that he took care of some accounting for both companies and did some accounting work for both of them until they were in the hands of the receiver (731); that all he had to do with the accounting of the Union Reserve Life Insurance Company was to make the closing entries at the end of the year (262); that he did not open up the books of the State Securities Corporation, but that he kept the books and records of the State Securities Corporation until 1933 (743); that after 1933 no books were kept except the cancelled checks and check stubs and memoranda kept in the office; that this defendant had all of these things furnished him in making up the annual account of State Securities Corporation (744, 745); that of the entries made in Government's Exhibit No. 8, this defendant only made the closing entries on pages 202, 203, 204, 205 (295) that in Government's Exhibit No. 12, the closing entries on pages 239, 240, 241, 242, were the only part of the book which was in the hand writing of defendant Canning and that these pages contained a summary or recapitulation of the years, made by defendant Canning, and from which

statements to the Arizona Corporation Commission, Exhibit No. 7, for the year 1936, was taken (302). The evidence of the witness E. P. Hair, Government's accountant, is that the statements made by defendant Canning in the annual reports to the Corporation Commission of the financial condition of Union Reserve Life Insurance Company accurately reflected what appeared in the books of the company, in the ledger and cash journal; that the item of $7150 Home Owner's Loan bonds appeared in the ledger of the Union Reserve Life Insurance Company; that the increase in the mortgages in the amount of $11,000 was reflected in the ledger of the Union Reserve Life Insurance Company; that the statement in all its aspects clearly reflects the cash books and the ledger of the Union Reserve Life Insurance Company (637, 638). This is the burden of the testimony throughout the entire case. Nowhere is there any evidence which directly or by implication can be said to even cast any stain upon defendant Canning. There is no direct evidence, nor is there any evidence from which the implication or presumption might arise that the defendant Canning took any part in the formation of any scheme or device to defraud, if such scheme or device was made. There is no direct evidence, nor is there any evidence from which presumption or implication might arise that defendant Canning had anything to do with the use of the mails in the furtherance of any scheme or device to defraud, or for any other purpose in so far as the other defendants are concerned, or in so far as the State Securities Corporation or Union Reserve Life Insurance Company are concerned. All of the evidence which shows any connection of defendant Canning with either of these two companies shows conclusively that

he was an accountant, occasionally employed by the two companies for the purpose of auditing the books and, from the books, making financial statements. There is no competent evidence reasonably tending to sustain the charge in any count of the indictment, nor is there any evidence sufficient to overcome the presumption of innocence of this defendant, or to show this defendant guilty beyond reasonable doubt.

Where such situation exists in the testimony it is clearly the duty of the trial court to direct the verdict. Particularly was this true in the case at bar, as shown by the fact that the jury found the defendant Canning not guilty on the first five counts in the indictment. Having done this, it clearly appears from the whole record of the evidence that the Court should have directed the verdict on all six counts in the indictment, because, by the acquittal of defendant Canning by the jury on the first five counts, there was then nothing left to sustain a verdict of guilty on the sixth count.

16 *C. J.* 935, sec. 2299;

Salinger v. U. S. (CCA 8 1927) 23 F. (2d) 48;

Tucker v. U. S. (CCA 8 1925) 5 F. (2d) 818;

Beck v. U. S. (CCA 8 1929) 33 D. (2d) 107;

Kritcher v. U. S. (CCA 2 1927) 17 F. (2d) 704;

Freeman v. U. S. (CCA 3 1927) 20 F. (2d) 748;

In a search of the authorities the case which we found nearest in fact to the instant case is *Scheib v. U. S.*

(CCA 7 1926) 14 Fed. (2d) 75. The facts in this case were that among the defendants convicted of a scheme to defraud were two auditors who had audited the books of the fraudulent company, the audit purported to be an audit of the books only and did not purport to be an appraisal or certification of the values. The audit showed a surplus which was due to write-up of values but the auditors had no connection to the write-ups which were reflected in the books. The Court, in reversing the conviction of the two auditors, used the following language:

> "It does not appear that Willis and Haight had any prior contact or dealings with Hawkins, or any interest in him or his companies, and for anything that was shown to the contrary, they, residing in Indianapolis, were employed in the regular way to do this work, and it does not appear that they were to receive or did receive for their work anything beyond the usual and ordinary compensation for such service. While a report so predicated, unaccompanied by an appraisal, can give little assurance to the public as to the true condition of the concern itself, apart from that of its books and records, nevertheless, so far as regards the items here particularly relied on to indicate criminality, the evidence shows they were taken from the books and records of the company, just as they purport to be, and we are unable to perceive in the transcript any evidence of criminal conduct of these two."

A comparison of the facts in the instant case with the remarks of the court as to the facts in the case just mentioned indicates a very close parallel. In the in-

stant case the evidence heretofore referred to, of the Government's witness Hair, is that the audit and statements made by the appellant Canning correctly reflected the books and records of the company. That being true, it is impossible to see anything in the evidence to connect the appellant with any scheme or device to defraud.

VIII.

The Court erred in instructing the jury and in refusing appellant's requested instruction. (Assignments of Error Nos. LXXIV, LXXV, LXXVI, LXXVII, LXXVIII, LXXIX, LXXX, LXXXI, LXXXII, LXXXIII, LXXXIV, LXXXV, LXXXVI, LXXXVII, LXXXVIII, LXXXIX, XC, XCI, XCII, XCIII, XCIV, XCV, XCVI, XCVII 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236).

ASSIGNMENTS OF ERROR NOS. LXXIV, LXXV, LXXVI, LXXVII, LXXVIII, LXXIX LXXX, LXXXI, LXXXII, LXXXIII, LXXXIV, LXXXV, LXXXVI, LXXXVII, LXXXVIII, LXXXIX, XC, XCI, XCII, XCIII, XCIV, XCV, XCVI, XCVII.

In presenting this argument it logically falls into two classifications: The first covering Assignments of Error Nos. LXXIV, LXXV, LXXVI, LXXVII, LXXVIII, LXXIX and LXXX (213, 214, 215, 216, 217, 218, 219, 220, 221) which are instructions given by the court and to which exception was taken by the defendant appellant Canning before the jury had retired to consider its verdict (944, 945, 946, 947, 948, 949 and 950) and dealt

with the adoption by one defendant of statements or representations made by others, the duty of individual jurors in this case, the instructions relative to the application of acts of Congress to this case, the proof necessary to establish the appellant's connection with any scheme, the terms of the act under which this indictment was found, the duty of employees, and the right of a defendant to testify in his own behalf. The second classification deals with the rest of the Assignments of Error specified under this heading (LXXXI, LXXXII, LXXXIII, LXXXIV, LXXXV, LXXXVI, LXXXVII, LXXXVIII, LXXXIX, XC, XCI, XCII, XCIII, XCIV, XCV, XCVI, XCVII, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236) and are instructions on practically all phases of the case, which this defendant appellant insists correctly state the law and which this defendant appellant insists he had a right to have given expressly for him in order that the jury might properly consider the testimony as it applied to him. (See Appendix for Assignments of Error in full, pp. 122-142)

DID THE COURT ERR IN INSTRUCTING THE JURY AND IN REFUSING APPELLANT'S REQUESTED INSTRUCTION?

The appellant insists that the part of the instruction complained of in Assignment of Error No. LXXIV (213, 214) does not correctly state the law, because as there set out and as given by the Court it completely ignores any question of the knowledge of the person adopting the statements or representations as to the falsity of such representations and statements. It makes a flat state-

ment without any regard to the qualification which must be placed thereon, that before any responsibility attaches to the person who incorporates such statements or representations in their literature, he must either know such representations and statements are false or such incorporation must be done with a wanton and reckless disregard as to their truth or falsity. The instruction was entirely misleading and under it the jury had no choice in the matter, no difference what the evidence showed. That this was prejudicial to the defendant Canning cannot be doubted, because of the Government's attempt to prove that a portion of Government's Exhibit No. 7, being the annual report for 1936, filed by the insurance company with the Corporation Commission, contained many figures not prepared or made in said report by the defendant appellant Canning, the said report having been signed by the appellant Canning. Under such circumstances and under this instruction, the jury was undoubtedly mislead.

In the instruction complained of in Assignment of Error No. LXXV (214, 215, 216) the Court attempted to instruct the jury as to how the jury should deliberate. In so doing the Court used language throughout the entire part of the instruction complained of which tended to impress upon the jury, and each individual member thereof, that he should not follow his own opinion made up from the law and the evidence, but that he should consider that the other members of the jury who differ from him were undoubtedly more nearly right than he and that he should follow their line of thinking. The Court even went so far as to say that in theory if every juror followed the Court's instruction as to how he

should make up his mind a hung jury would be impossible. But the final cap sheaf was placed upon the error in the instruction in the last two sentences, which read as follows:

> "Nothing results from your oath requiring you to reason differently or change your mature method of reasoning from the course you would pursue in your private affairs in determining a serious question. The effect of your official position as jurors is to face you with an obligation to calmly and seriously study the evidence, to ascertain the clear existence of fundamental facts asserted to have been shown in the evidence and to correlate them properly into a line of proof so that, as jurors, you are able to say that the ultimate facts of the guilt charged against a defendant is shown to a moral certainty, whereas, if it were a private matter, you might be satisfied with a solution which is supported by a mere preponderance of evidence."

In the first place jurors cannot apply the same line of reasoning to their deliberations as jurors that they apply to their own private business affairs. In consideration of their verdict as jurors they are bound to consider only the law and the evidence. They are not privileged to do as they do in their private affairs, go into realms of speculation and consider what the ultimate effect of their decision will be at some time in the future, or as to what the effect might be upon this person or that person, and as to what certain facts may develop when an investigation is made thereof, and many other things which occur in every day life and

business affairs. If jurors followed this instruction, as laid down by the Court, in their deliberations no one would be safe who is charged with a criminal offense. One of the greatest safeguards which surrounds a defendant in a criminal case is that the jury took an oath to render its verdict based upon the law and the evidence. The greatest vice in this instruction is the last sentence quoted above, for in that the Court states flatly that the effect of the position as a juror is to find the ultimate facts of the guilt charged against a defendant. It will be noted that the instruction opened with a short sentence, which says that no juror should vote for the conviction of a defendant as long as he entertains a reasonable doubt of the defendant's guilt, and then closes with a direction to the jury to correlate the facts that they may be able to say that the defendant is guilty. It is hard to conceive an instruction which would be more prejudicial to the defendant in a criminal case than the instruction complained of.

In the instruction complained of in Assignment of Error No. LXXVI (217, 218) the Court goes entirely outside of the record and gives an instruction which is confusing and misleading and leaves in the minds of the jury the inference that fraud existed regardless of the evidence and over emphasizes the question of fraud in undertaking to set out the gist of the evidence.

In the instruction complained of in Assignment of Error No. LXXVII (218) the instruction is bad because it totally ignores the question of fraud in the inception and leaves out the question of intent, which is a necessary element at the time of the inception of the scheme, if any existed.

The instruction complained of in Assignment of Error No. LXXVIII (218, 219) does not correctly state the law, is ambiguous and misleading and incomplete, and completely ignores the necessary element of an intent to defraud.

The instruction complained of in Assignment of Error No. LXXIX (219, 220) incorrectly states the law. No where in the law is it found that it is the duty of every employee to know the nature of the business being transacted by his principal. Even if the principle of law laid down in the instruction were correct, still the Court lost sight of the fact that this appellant was employed by the State Securities Corporation and by the Union Reserve Life Insurance Company, who were his principals, and neither of which corporation is charged with any wrong doing. If this instruction of the court was carried to its logical conclusion then a duty would devolve upon every man, ditch digger, or otherwise, to inquire into and ascertain the nature of the business which his employer was conducting in order that he might protect himself from criminal prosecution if it later developed that the man for whom he worked in the capacity of a laborer had been using some branch of his business for the purpose of defrauding someone. We cannot believe this Court will sanction that statement of the law.

The instruction complained of in Assignment of Error No. LXXX (220, 221) is the stock instruction usually given, except the last sentence, which is as follows:

> "Where a witness has a direct personal interest in the result of a case, especially in a criminal case,

> the temptation may be strong to color, pervert or withhold the facts."

Clearly this gratutious statement in this instruction, after having given a complete instruction, was intended to impress upon the minds of the jury that the defendant appellant in this case had colored, perverted or withheld the facts. The instruction was highly prejudicial.

The questions presented by the remainder of the Assignments of Error discussed under this argument (LXXXI, LXXXII, LXXXIII, LXXXIV, LXXXV, LXXXVI, LXXXVII, LXXXVIII, LXXXIX, XC, XCI, XCII, XCIII, XCIV, XCV, XCVI, XCVII, 222 to 236 inclusive) are that this defendant appellant, owing to the peculiar position which he occupied in the whole transaction, that is, that he was merely an occasional employee and was not one who had any concern in the formulation of the policy of the companies, management, direction, control or operation of the companies, was entitled to have instructions given separately, which clearly set forth the law in so far as it related to him in the light of the evidence. He was not in the same position with the other defendants, who were officers, directors and stockholders in the corporations. To say that his conduct, in view of all the evidence, should be considered under the general instruction applied to the other defendants was clearly prejudicial error. There were no instructions given which defined the appellant's position or connection with the other defendants. Under all the evidence in the case, the appellant was employed, not by any of the other defendants, but by the two corporations. Certainly he was

entitled to have some instructions given on his behalf which clearly set out the law relative to the appellant as an employee of the corporations rather than to have instructions which left the jury to find that no difference by whom he was employed he was responsible for the acts and declarations of the other defendants.

IX.

The Court erred in refusing to strike from the testimony the exhibits admitted in evidence on behalf of the Government. (Assignments of Error Nos. IV, VII, XVII, XXVIII, LXV, LXVI, LXVII, LXVIII, LXXIII, 166, 167, 168, 179, 180, 186, 207, 208, 209, 213).

ASSIGNMENTS OF ERROR NOS. IV, VII, XVII, XXVIII, LXV, LXVI, LXVII, LXVIII, LXXIII.

The Assignments of Error relied upon and discussed under this division of the argument have to do entirely with the motion to strike the Government's Exhibits in evidence which were admitted in evidence over defendant's objection. (See Appendix for Assignments of Error in full, pp. 142-146)

DID THE COURT ERR IN REFUSING TO STRIKE FROM THE TESTIMONY THE EXHIBITS ADMITTED IN EVIDENCE ON BEHALF OF THE GOVERNMENT?

It is the contention of the appellant that the Court erred in refusing to strike from the evidence at the close of the Government's case and at the close of the

whole case the exhibits offered and received in evidence over the objection of this defendant, for the reason that at the close of the Government's evidence, and at the close of all the evidence, there had been no proper foundation laid for the introduction of the exhibits and, as to this defendant, they were inadmissible, being pure hearsay, and that said exhibits had not been properly identified as required by law, and that there had been no proof of any participation by this defendant in any scheme or device to defraud, nor any use of the mails in furtherance of such scheme or device, or that this defendant had entered into any conspiracy with any of the other defendants, or any other person. In addition to these statements, the Court's attention is called to the argument presented under Subdivision IV of the argument in this brief, which this appellant asks be applied equally to this portion of the argument.

CONCLUSION

It is respectfully submitted that in view of the errors complained of and the law relative thereto, that this Court should reverse the conviction of appellant and remand the case with directions to the United States District Attorney to dismiss the indictment and order the release of this appellant, Earl Canning.

Respectfully submitted,

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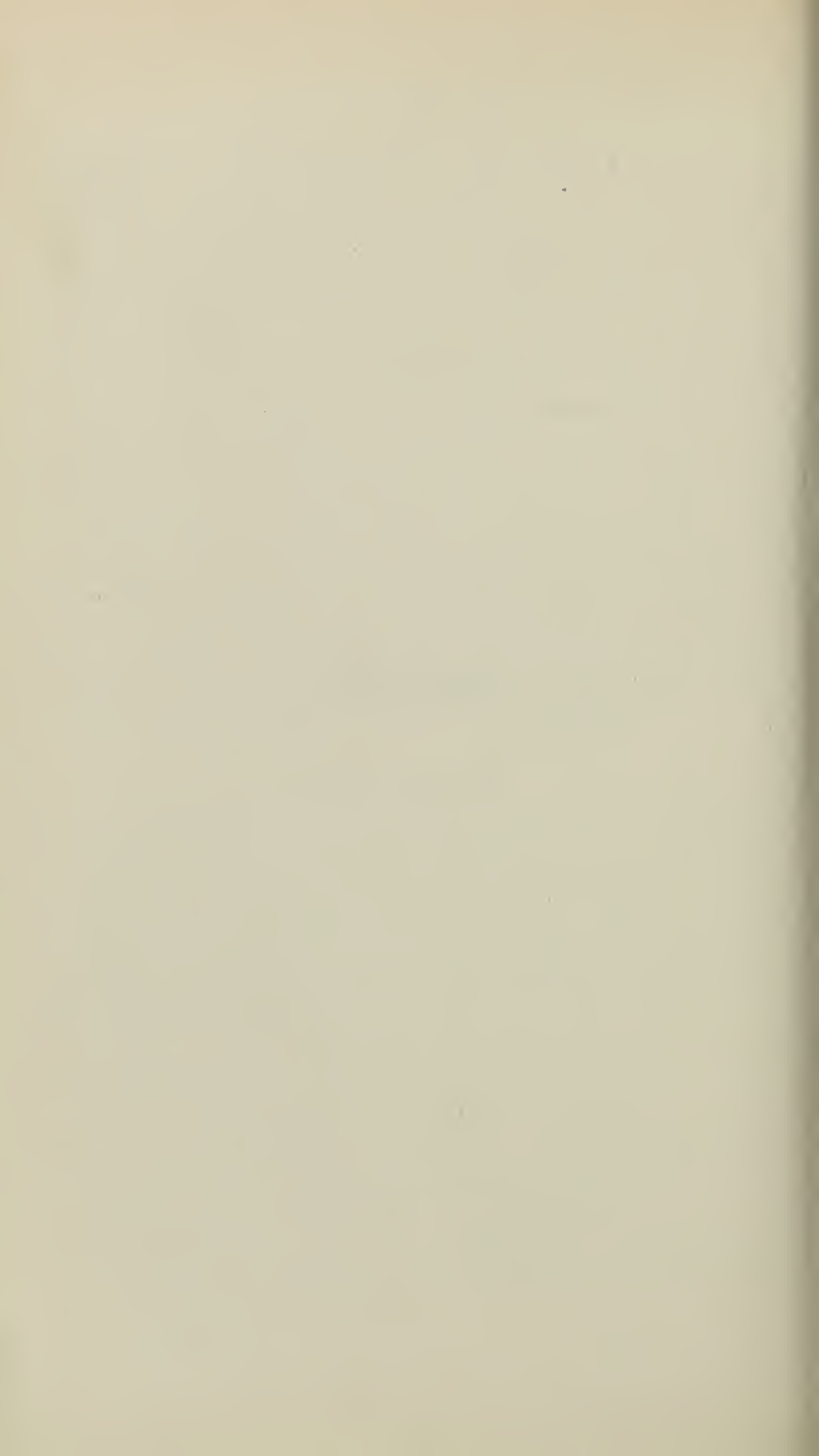
Attorneys for Defendant
Appellant Earl Canning

Appendix



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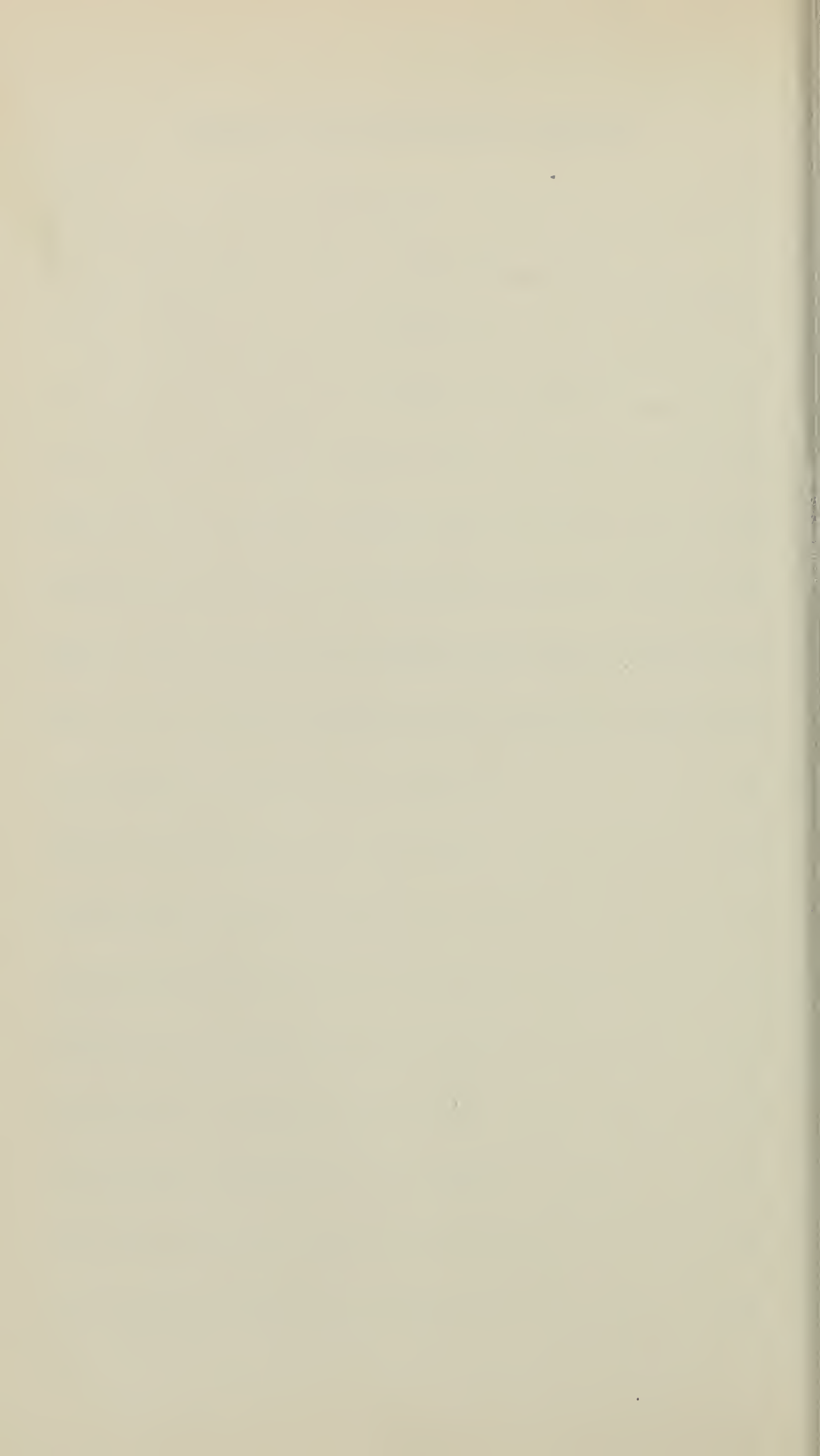

APPENDIX

ASSIGNMENTS OF ERROR

—*—

SUBDIVISION NO. I OF ARGUMENT

ASSIGNMENT OF ERROR NO. I

The Court erred in overruling this defendant's demurrer to the indictment upon the grounds and for the reason that the said indictment was and is insufficient in the following particulars:

(a) Said indictment does not, nor does any count thereof, state facts sufficient to constitute an offense against the United States or the laws thereof.

(b) Said indictment does not, nor does any count thereof state facts sufficient to constitute an offense by this defendant against the United States or the laws thereof.

(c) The first count of said indictment does not state facts sufficient to constitute an offense against the United State or the laws thereof.

(d) The first count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United State or the laws thereof.

(e) The second count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.

(f) The second count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United States or the laws thereof.

(g) The third count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.

(h) The third count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United States or the laws thereof.

(i) The fourth count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.

(j) The fourth count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United State or the laws thereof.

(k) The fifth count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.

(l) The fifth count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United States or the laws thereof.

(m) The sixth count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.

(n) The sixth count of said indictment does not state facts sufficient to constitute the offense by this defendant against the United States or the laws thereof.

(o) Said indictment does not, nor does any count thereof state facts sufficient to constitute an offense described in Section 37 of the Criminal Code (18 U. S. C. A., sec. 88).

(p) Said indictment does not, nor does any count thereof state facts sufficient to constitute the offense described in Section 37 of the Criminal Code (18 U. S. C. A., sec. 88.)

(q) Said indictment does not, nor does any count thereof, state facts sufficient to constitute any scheme or artifice to defraud or for obtaining money or property by means of false, misleading or fraudulent representations, pretenses or promises.

(r) Said indictment does not, nor does any count thereof, state facts sufficient to constitute any conspiracy, combination or confederation to commit any offense against the United States or the laws thereof.

(s) Said indictment, and each separate count thereof, is duplicitous in that each of said counts states the commission of more than one offense against the United States or the laws thereof, if any such offense is stated at all.

(t) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of the offense or offenses with which he is sought to be charged.

(u) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite that this defendant cannot properly prepare his defense thereto.

(v) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as to be of no protection to this defendant in the event of a second prosecution for the same offense or offenses sought to be charged therein.

(w) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of the part or parts of said alleged scheme or artifice to defraud, if any, with which he is charged with devising, intending to devise, or participating in.

(x) Said indictment and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of what participation, if any, he is charged with having had in the mailing, causing to be mailed, delivery, or causing to be delivered, of any of the indictment letters.

(y) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of what part or parts of said alleged scheme or artifice to defraud, if any, were or are fraudulent or false or illegal or wrongful.

(z) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of how, or why, or by reason of what facts, if any, the various parts alleged to have been embraced in said alleged scheme or artifice to defraud, were or are, or any of them was or is, fraudulent or false or illegal or wrongful.

(1-a) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant whether he is charged with devising or intending to devise only one scheme or artifice to defraud, or more than one such scheme.

(1-b) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of how, or in what manner or by reason

of what facts, if any, the alleged scheme or artifice to defraud, or any part thereof, tended to, or did, defraud all or any of the alleged "victims" referred to in said indictment. (158, 159, 160, 161, 162).

SUBDIVISION NO. II OF ARGUMENT

ASSIGNMENT OF ERROR NO. II

The Court erred in overruling the objections of this defendant to the Bill of Particulars, as filed herein, and in denying this defendant's motion for an order requiring the government to supplement the same, for the reasons,

(a) That paragraphs I, II, III, IV, V, IX, X, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, and XXVIII of the Bill of Particulars, as filed, and each of them, severally and separately are evasive, indefinite, incomplete and constitute conclusions of law and do not fully or fairly disclose the information sought by this defendant in his motion for a Bill of Particulars, and the motion of this defendant requiring the government to file a supplemental Bill of Particulars fully and fairly setting forth the information requested by this defendant in his motion for a Bill of Particulars should have been granted.

(b) That paragraphs VI, VII, VIII, XI, XII, XIII, XIV, XV, XXXIX, XLIV, XLVI, XLVII, XLVIII of the Bill of Particulars, as filed, severally and separately are evasive, indefinite, uncertain, incomplete and constitute conclusions of law and do not fairly disclose the information requested by this defendant in his motion for Bill of Particulars, and the Court erred in

denying this defendant's motion for an order requiring the government to file a supplemental Bill of Particulars fully, fairly and completely disclosing the information requested by this defendant in his motion for a Bill of Particulars.

(c) The Bill of Particulars, as filed, discloses that the financial statement referred to in paragraph numbered 5 of the sixth count of the indictment, and the financial statement referred to in paragraph numbered 3 of the sixth count of the indictment were not identical and the difference between the two statements was not fairly and fully disclosed by the government's Bill of Particulars, as filed, and this defendant was entitled to have the said financial statement or statements, set forth in said Bill of Particulars in order that he might properly prepare his defense to the sixth count of the indictment.

(d) This defendant was entitled to have set out in a supplemental Bill of Particulars a copy of all written statement, representations or reports claimed to have been made by any of the defendants to the Corporation Commission of the State of Arizona and to Dunne's Insurance Reports, Louisville, Kentucky, which were referred to in Paragraph VIII of the Bill of Particulars as filed, and claimed by the government to contain false, fraudulent, misleading representations and promises, in order that this defendant might properly prepare his defense to the indictment.

(e) By the Court's overruling of said objections and denial of this defendant's motion for a supplemental and further Bill of Particulars, this defendant was forced

to proceed to trial without information concerning the particulars of the offense with which he was charged, necessary to the preparation of his defense. (162, 163, 164, 165)

SUBDIVISION NO. III OF ARGUMENT

ASSIGNMENT OF ERROR NO. X

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of defendant appellant, government's Exhibit No. 27A, which abstracted to the issue involved is in full substance as follows:

> Minutes of special meeting of the board of directors of Union Reserve Life Insurance Company, March 30, 1933. Special meeting of the board of directors of the Union Reserve Life Insurance Company was held March 30, 1933 at the hour of twelve o'clock noon. Meeting was called to order and minutes of special meeting of December 31, 1932 were read and approved. State Securities Corporation has purchased the interest of Lorenzo M. Stohl in option agreement dated April 25, 1932 by M. E. Waddoups and Lorenzo M. Stohl for the purchase of 823 shares of capital stock of First National Life Insurance Company of Arizona. State Securities Corporation desires to endorse to M. E. Waddoups without recourse to apply on the payment of said 823 shares to Tomasita L. Lewis note and mortgage conveying to M. E. Waddoups and Ralph Murphy property at its face value of $27,889.86, and to accept in lieu thereof certain first mortgage securities belonging to State Securities Corporation and approved by

Arizona Corporation Commission for the use of Union Reserve Life Insurance Company as capital or surplus and to release that certain mortgage executed by Vinnie R. and Lorenzo M. Stohl in the amount of $7,000 covering property in Salt Lake City, Utah and to accept in lieu thereof from State Securities Corporation, first mortgage securities in equal amount of principal and interest approved by the Arizona Corporation Commission and to transfer to M. E. Waddoups without recourse the payment of the purchase price of stock, other notes held by the company and assigned therewith to M. E. Waddoups, mortgages securing the same on or before April 25, 1924, and to accept from said State Securities Corporation other first mortgage securities in amount equal to said mortgages so assigned when approved by the Arizona Corporation Commission. The officers of the company were directed to do and perform all things necessary under the terms of said suggestions and offer of State Securities Corporation. The offer of the State Securities Corporation to guarantee and pay all of the operating expenses of the Union Reserve Life Insurance Company, both in the office and field, including all compensation of officers, employees, agents, medical directors and any and all other expenses so that the company itself would not pay out any money in the conduct and procuring of business other than legal reserves, reinsurance premiums and death claims on a commission basis of ninety-five per cent of the first year and seven and one-half per cent yearly renewals as the premiums were paid. This offer was accepted and extension of loan of M. E. Waddoups for five

> years was approved. By motion, the membership of the board of directors of the company was increased to fifteen, and R. F. Marquis, George H. Cornes, H. S. Marquis, Wm. C. Fields, A. M. McLellan, George Dell, Jas. M. Meason, N. C. Bledsoe, W. E. Hawley and L. Jo Hall were appointed additional members of the board of directors. Meeting adjourned.

for the reason that the said exhibit was hearsay, and had not been properly identified; that as to defendant Canning they were immaterial, irrelevant and hearsay. The defendant Canning never having been an officer, director or stockholder in that company, said minutes could in no way bind defendant, and for the further reason that if the Court admitted the said Exhibit in evidence, it should have instructed the jury as requested by defendant appellant that it could have no effect as to defendant appellant, and should not have been considered as to him. (170, 171, 172, 173)

ASSIGNMENT OF ERROR NO. XI

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, government's Exhibit No. 27B which abstracted to the issue is in full substance as follows:

> Minutes of meeting of the executive committee of the Union Reserve Life Insurance Company, August 8, 1936. Meeting was held August 8, 1936 at the home office of the company. Meeting called to order by Mr. Cornes. All members present. Minutes

of previous meetings read and approved. Meeting was informed that State Securities Corporation had requested Union Reserve Life Insurance Company to execute back to the said State Securities Corporation the following: Promissory note in the sum of $17,500 executed by R. F. Marquis, Trustee, secured by mortgage covering farm units N. P. in the S½ of Q. Section 6, Township 1 South, Range W of the G. & S. R. B. & M., containing twenty-five acres more or less; Promissory note in the sum of $3,000 executed by George H. Cornes, Trustee, secured by mortgage covering North one-half of Farm Unit Q, Section 6, Township 10 South, Range 23 West of the G. & S. R. B. & M., containing five acres more or less; Promissory note in the sum of $12,000 executed by George H. Cornes, Trustee and secured by mortgage covering farm units M. and N., Section 7, Township 10 South, Range 23 West of the G. & S. R. B. & M. It was stated that it was the intention of the executive committee of State Securities Corporation to accept in lieu of said notes and mortgage to be assigned, notes and mortgages in the respective sums of $21,500, $4,500 and $17,500 for use by State Securities Corporation for Additional assets; that such notes and mortgages be accepted on condition that they be used for that purpose and that the trustee giving the same receive back the notes and mortgages in the sums of $17,500, $3,000 and $12,000 or their equivalent in cash when in the opinion of the executive committee same could be returned without impairing the assets of the corporation. It was stated that it would be highly beneficial to have the State Securities Corporation receive such

> assets and transfer the same to this company as assets. By resolution the offer was accepted and the proper officers instructed to carry out the provisions of said proposition. Meeting adjourned.

for the same reason set forth in assignment of Error No. X; that as to defendant appellant said minutes were hearsay. No proper foundation had been laid and no showing that defendant appellant was present at said meeting or had any connection or interest therein, or knowledge of such. (173, 174, 175)

ASSIGNMENT OF ERROR NO. XII

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, government's Exhibit No. 27C which abstracted to the issue is in full substance as follows:

> Minutes of annual meeting of stockholders of the Union Reserve Life Insurance Company, January 14, 1936. Annual meeting of stockholders of Union Reserve Life Insurance Company was held at offices of the company Tuesday, January 14, 1936. Secretary announced there was represented at the meeting 954 shares of the outstanding capital stock of the company. No shares were represented by proxy. A quorum was declared present. Minutes of previous meetings of the executive committee read and approved. Copy of resolution adopted by State Securities Corporation authorizing R. F. Marquis to vote all stock owned by the State Securities Corporation with full authority to act in the interest of the cor-

poration was read. On motion this resolution was approved and granted. Preliminary statement and report of the operations of the company for the year ending December 31, 1935, read and discussed. All claims and expenditures reviewed and fully discussed and noted that all real estate mortgages were in good condition. Other assets were not in default of interest. Items of policy loans was especially low and the amount saved out of each $1.00 of income compared favorably with other companies. Moved that the names of Allen Belluzzi be placed in nomination for membership upon the board of directors. Motion carried. Other matters were discussed and the meeting proceeded to the election of directors. By unanimous ballot the following directors were elected:

Dr. F. T. Hogeland
L. Jo Hall
Dr. N. C. Bledsoe
Dr. Jas. M. Meason
W. E. Hawley
H. S. Marquis
G. H. Cornes
R. F. Marquis
Wm. C. Fields
E. G. Hamilton
A. M. McLellan

All acts and expenditures made and performed by the officers and committee since last annual meeting of the stockholders was reviewed, endorsed, approved and adopted as the acts of the company. The business

> of the company was discussed at length and the meeting adjourned.

for the same reasons set forth in assignment of error No. X. (175, 176, 177)

ASSIGNMENT OF ERROR NO. XXXIV

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 42 in evidence, which purports to be a carbon copy of a letter addressed to Mr. George H. Cornes, Hotel Utah, Salt Lake City, Utah, under date of November 22, 1934, for the reason that no proper foundation was laid for the introduction of such evidence, no showing was made of the loss or destruction of the original, no showing was made that the original had ever been mailed or received by the person to whom addressed, there was nothing in the letter to prove any allegation in the indictment or any count in the indictment, either of the formation of a scheme or device to defraud, the use of the mails to defraud or a conspiracy, and the said letter was incompetent, irrelevant and immaterial. (189, 190)

ASSIGNMENT OF ERROR NO. XXXV

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 43, which purports to be a carbon copy of a letter addressed to Mr. George H. Cornes, Newhouse Hotel, Salt Lake City, Utah, under date of December 7, 1934, for the same reasons that the Court

erred in admitting Government's Exhibit No. 42, set forth in Assignment of Error XXXIV above, and for the further reason that there was no sufficient identification of the purported carbon copy of the letter. (190)

ASSIGNMENT OF ERROR NO. XXXVI

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 44, being a purported carbon copy of a letter dated December 12, 1934 addressed to Mr. George H. Cornes, Hotel Utah, Salt Lake City, Utah, for the same reasons that the Court erred in admitting Government's Exhibit No. 42 set forth in Assignment of Error XXXIV above. (190)

ASSIGNMENT OF ERROR NO. XXXVII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's exhibit No. 46, being a purported carbon copy of a letter dated December 7, 1934, addressed to Mr. George H. Cornes, New House Hotel, Salt Lake City, Utah, for the same reasons that the Court erred in admitting Government's Exhibit No. 42 set forth in Assignment of Error XXXIV above. (190, 191)

ASSIGNMENT OF ERROR NO. XXXVIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 47, being a purported carbon copy

of a letter dated November 19, 1934, addressed to Mr. George H. Cornes, Hotel Utah, Salt Lake City, Utah, for the same reasons that the Court erred in admitting Government's Exhibit No. 42 set forth in Assignment of Error XXXIV above, and for the further reason that no proper identification had been made of said letter. (191)

ASSIGNMENT OF ERROR NO. XXXIX

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 27-D, being purported minutes of a meeting of the Board of Directors of the Union Reserve Life Insurance Company, held May 15, 1933, which are unsigned, for the reason that no proper foundation had been laid for its introduction, that it is remote, unsigned and as to defendant appellant Canning irrelevant, incompetent and immaterial; not binding and pure hearsay, and for the further reason that the said purported minutes had not been properly, or at all, identified as being the minutes of any meeting regularly held. There was no showing that any of the defendants were present or that such a meeting had ever been held. (191, 192)

ASSIGNMENT OF ERROR NO. XL

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 27-E, purporting to be unsigned minutes of a meeting of the Board of Directors of Union Reserve Life Insurance Company, held March

29, 1937, for the reason that the said minutes had not been properly identified, they are unsigned, there was no showing that any such meeting had ever been held, and no showing that defendant appellant Canning ever attended any such meeting, and it was affirmatively shown that the defendant Canning was not an officer, stockholder or director of such company, and as to him the said minutes are irrelevant, incompetent, immaterial and pure hearsay, and there was no showing that George H. Cornes, or any of the other persons named therein, had ever attended such a meeting or that such a meeting had in fact ever been held. (192)

ASSIGNMENT OF ERROR NO. XLI

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 26-A, purporting to be unsigned minutes of a meeting of the stockholders of State Securities Corporation held February 9, 1937, for the reason that said minutes were not properly identified, they were not signed, there was no proof that any of the persons named therein ever attended such a meeting or that such a meeting had ever been held. There was no showing that defendant appellant Canning ever knew anything about any such purported meeting, and it was affirmatively shown that he was not a stockholder, officer or director of said company, and as to him the said minutes were pure hearsay, immaterial, irrelevant and incompetent. (193)

ASSIGNMENT OF ERROR NO. XLII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over

the objection and exception of the defendant appellant, Government's Exhibit No. 26-B, which purports to be unsigned minutes of a meeting of the stockholders of State Securities Corporation, held February 8, 1938, for the reason that there was no showing that defendant Canning attended such meeting, there was no showing that such a meeting was ever held, the minutes had not been properly identified and no foundation was laid for their introduction. The minutes purport to be of a meeting held in February, 1938, long after the transactions set forth in the indictment. There was no showing that George H. Cornes, or any of the other persons named in said minutes, ever attended such meeting, or that such meeting had ever been held. (193, 194)

ASSIGNMENT OF ERROR NO. XLIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 26-C, being purported minutes of a meeting of the Executive Committee of State Securities Corporation, held September 5, 1936, unsigned, and no showing was made that a meeting of the Executive Committee was held on said date, nor as to who was present thereat, and no attempt to show that the defendant appellant Canning attended such meeting or knew anything concerning the same, and it was affirmatively shown that he was not a member of said Executive Committee, there was no showing as to what had become of the original letter setting forth such minutes, if there had been one, and no proper foundation laid for its introduction, nor properly identified and as to defendant appellant Earl Canning pure hearsay. (194)

ASSIGNMENT OF ERROR NO. XLIV

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 45, being an envelope addressed to Mrs. W. H. Etz, Benson, Arizona, return address, State Securities Corporation, 210 Luhrs Tower, Phoenix, Arizona, bearing cancellation stamp, Phoenix, Arizona, April 4, 1935, 8:30 P. M., purporting to contain a letter signed by R. F. Marquis, and the annual report or financial statement of Union Reserve Life Insurance Company, of December 31, 1934, for the reason that as to defendant Canning the letter is hearsay, it is not binding on him, is irrelevant, incompetent and immaterial, is not within the issues described in the indictment or in the bill of particulars. (194, 195)

ASSIGNMENT OF ERROR NO. XLV

The Court erred in permitting the witness Helen G. Etz to testify to purported conversations held in August or September, 1937, with E. G. Hamilton and R. F. Marquis, over the objection of defendant Earl Canning that as to him the said testimony was purely hearsay, there was no showing that defendant appellant Canning was present or knew anything of the conversation, and no proper foundation had been laid. (195)

ASSIGNMENT OF ERROR NO. XLVI

The Court erred in permitting the witness Helen G. Etz to testify as to a purported conversation between E. G. Hamilton, Mr. Etz' father and mother and the witness, on December 24, 1937, after the time of

the charge in the indictment, over the objection of the defendant appellant that it was subsequent to the date of the offense alleged in the indictment, it was not mentioned in the indictment or in the bill of particulars. There was no showing that he was present or knew of the conversation, and as to him it was pure hearsay. (195, 196)

ASSIGNMENT OF ERROR NO. XLVII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 50, being a business card containing on its face in figures and printing, "3-5382, E. G. Hamilton, Vice President, Union Reserve Life Insurance Company, Phoenix, Arizona", for the reason that it was too remote, subsequent to the dates mentioned in the indictment, having no bearing on any charge therein set forth, and as to defendant appellant, hearsay, irrelevant, incompetent and immaterial. (196)

ASSIGNMENT OF ERROR NO. XLVIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 35, being a letter dated September 27, 1937, addressed to Mr. W. H. and/or Mrs. Helen G. Etz, Yarnell, Arizona, with its enclosures and envelope, for the reason that no foundation was laid for its introduction as against defendant appellant Canning, and as to him it was pure hearsay, irrelevant, immaterial, and incompetent, because there has been no

showing that he had any connection with it or any knowledge of the transaction. (196, 197)

ASSIGNMENT OF ERROR NO. XLIX

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 51, being a receipt dated at Yarnell, Arizona, September 16, 1937, signed by E. G. Hamilton, for the reason that as to defendant appellant Canning no proper foundation had been laid for its introduction and it is hearsay, immaterial, irrelevant and incompetent. (197)

ASSIGNMENT OF ERROR NO. L

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 52 and Government's Exhibit No. 53, consisting of a portion of the records of the First National Bank of Arizona at Phoenix, as set forth in the bill of exceptions, for the same reasons that the Court erred in admitting Government's Exhibit No. 12, set forth in Assignment of Error VIII, and for the further reason that no proper foundation had been laid, no proper identification of the exhibit was made, that as to defendant appellant they are pure hearsay, incompetent, irrelevant and immaterial. (197)

ASSIGNMENT OF ERROR NO. LI.

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 48-A and Government's Exhibit No. 49-A, being purported carbon copies of letters addressed to Insurance Index, concerning the financial report and publication of information relative to Union Reserve Life Insurance Company, for the same reasons the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX. (198)

ASSIGNMENT OF ERROR NO. LII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 54, consisting of two documents, being a letter written to H. F. Link under date of November 7, 1934, together with the second sheet enclosed therewith, addressed to H. F. Link, dated November 5, 1934, and setting forth the allocation of 100 shares of capital stock of State Securities Corporation to the said H. F. Link, for the reason that no foundation was laid for their introduction, that it is too remote, that it is not within the issues as made in the indictment or supplemented by the bill of particulars, and as to defendant appellant Earl Canning it is pure hearsay, immaterial, irrelevant and incompetent. (198)

ASSIGNMENT OF ERROR NO. LIV

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 34, consisting of a letter dated July 20, 1937, addressed to Mr. Gerald Palmer, Cross

Triangle Ranch, with its accompanying envelope and proxy receipt, for the reasons that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX, and for the further reason that the said exhibit is hearsay as to defendant Canning, irrelevant, incompetent and immaterial. (200)

ASSIGNMENT OF ERROR NO. LV

The Court erred in permitting the Government's witness, Bill Etz, to testify concerning a purported conversation held December 24, 1937, at his home at Yarnell, at which his wife, mother and father and Helen G. Etz were present, for the same reason that the Court erred in permitting Mrs. Etz to testify concerning the same transaction set forth in Assignment of Error XLVIII above. (200)

ASSIGNMENT OF ERROR NO. LVI

The Court erred in admitting in evidence on behalf of the plaintiff, United State of America, over the objection and exception of defendant appellant, Government's Exhibit No. 33, consisting of a stamped envelope, addressed to May E. Bonar, with a printed annual report of Union Reserve Life Insurance Company as of December 31, 1936, for the reason that as to defendant appellant Canning no proper foundation had been laid for its introduction, it had not been properly identified, it was irrelevant, incompetent, immaterial and hearsay. (200, 201)

ASSIGNMENT OF ERROR NO. LVII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 41, being a letter dated August 9, 1933, addressed to Mrs. May E. Bonar, with accompanying envelope, for the same reasons that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX above, and for the further reason that the letter was too remote, the stock was purchased three years before the date of the letter, and there is no charge or allegation concerning the mailing of the letter in the furtherance of any scheme to defraud, that it is immaterial, incompetent and irrelevant, and had not been properly identified and no proper foundation had been laid. (201)

ASSIGNMENT OF ERROR NO. LVIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 56, which is a letter dated February 1, 1932, and a balance sheet as of December 31, 1931, for the same reasons that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX above, and for the further reason that Government's Exhibit No. 56 is dated December, 1931 and February, 1932, and is too remote, irrelevant, incompetent, and immaterial and outside the issues of this case, and was not properly identified and no foundation was laid for its introduction, and as to defendant appellant it is hearsay. (201, 202)

ASSIGNMENT OF ERROR NO. LXI

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 32, being a letter dated June 22, 1937, accompanied by an envelope addressed to Mr. H. E. Simmons, Cave Creek, Arizona, and containing a copy of Dunne's Insurance Report on Union Reserve Life Insurance Company, Phoenix, Arizona, and a copy of the annual report of Union Reserve Life Insurance Company as of December 31, 1936, for the reason that no proper foundation was laid for the introduction of such exhibit as to this defendant appellant, and for the same reasons that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX above. (203, 204)

ASSIGNMENT OF ERROR NO. LXII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 62, which purports to be a carbon copy of an undated letter addressed to Mrs. May E. Bonar, 227 West Elm Street, Compton, California, for the reason that no proper foundation was laid for its introduction, that it was immaterial, and incompetent and hearsay as to defendant Canning, and for the reason that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX above. (204)

ASSIGNMENT OF ERROR NO. LXIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Gov-

ernment's Exhibits Nos. 26-D, 26-E, 26-F, 26-G, 26-H, 26-I, 26-J, 26-K, 26-L, 26-M, 26-N, 26-O, 26-P, 26-Q, 26-R, 26-S, 26-T, 26-U, 26-V, 26-W, 26-X and 26-Y, consisting of purported minutes of meetings, which are set forth in the bill of exceptions, for the reason that as to defendant Canning, no proper foundation had been laid for their introduction, no proof was offered that the purported minutes correctly relate what occurred at any of the purported meetings, and that as to defendant Canning, he not being an officer, director or stockholder of any of the companies, the said minutes are irrelevant, incompetent, immaterial and pure hearsay. (204,205)

ASSIGNMENT OF ERROR NO. LXV

The Court erred in denying the motion of defendant appellant made at the close of the government's case, to strike from the evidence all of the parts of the Government's Exhibit No. 26 and No. 27 for identification, which had been marked and put in evidence, they being the purported minutes of State Securities Corporation and Union Reserve Life Insurance Company, respectively, for the reason that as to defendant Canning they are hearsay and no foundation was laid for their introduction; they were not properly identified; there was no showing that the minutes were kept in the regular course of business of the two companies, but on the contrary the evidence shows that they were written up at the end of the year. There was no showing that they had ever been communicated to defendant appellant Canning or that he had any knowledge thereof. (207)

ASSIGNMENT OF ERROR NO. LXXI

The Court erred in admitting in evidence, on behalf of the plaintiff, United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 68, which is in full substance as follows:

Government's Exhibit No. 68

March 26, 1937

Mr. G. L. Reay
R. F. D.
Winkleman, Arizona

Dear Mr. Reay:

I am in receipt of letter from J. Elmer Johnson stating that he had requested you to call at this office in regard to mortgage held by this company on ninety (90) acres of land owned by Mr. Johnson and yourself.

We have been expecting you, but up to this date we have not had the pleasure of your visit. It is necessary that some adjustment of this past-due matter be made; hence I am asking that upon receipt of this letter that you give personal attention to the item.

I am enclosing stamped, addressed envelope for your convenience in advising when you can meet me at our office.

Very truly yours,

R. F. MARQUIS
Secretary-Treasurer

RFM:MD

for the reason that no proper foundation had been laid for its introduction as against the defendant appellant

Canning, as to him it is pure hearsay, irrelevant, incompetent and immaterial. (211)

ASSIGNMENT OF ERROR NO. LXXIII

The Court erred in denying the motion of defendant appellant, made at the close of all of the evidence, to strike all testimony given in the case of events claimed to have transpired subsequent to January 1, 1938, for the reason that, under Count Six, the conspiracy count of the indictment, the alleged conspiracy was alleged to have ended on January 1, 1938, and any events subsequent to such date would be wholly irrelevant, incompetent and immaterial and pure hearsay, and without the bounds of the indictment or the bill of particulars as it affects Count Six, the conspiracy charge, (213)

SUBDIVISION NO. IV OF ARGUMENT

ASSIGNMENT OF ERROR NO. III

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 5, which abstracted to the issue involved, in full substance is as follows:

> A portion of the records of the Arizona Corporation Commission containing an application of State Securities Company for authority to sell five thousand shares of the capital stock of the corporation at Twenty Dollars per share. Said Exhibit, having in it a copy of certificate of stock, balance sheet of September 30, 1930, bal-

> ance sheet of April 1, 1930, balance sheet of July 31, 1930, balance sheet of June 30, 1930, balance sheet of May 31, 1930, balance sheet of April 30, 1930, balance sheet of March 31, 1930, balance sheet of March 3, 1930, balance sheet of February 10, 1930, together with an agreement to purchase stock and the application setting out in detail the business of the company and the ownership of the corporation as of the date of filing, together with an approval of the application and an authorization of the issuance of the permit to sell five thousand shares of the stock.

for the reason that no proper foundation had been laid for the introduction of such Exhibit and for the reason that the Exhibit contains purported statements and correspondence which had not been identified as being made by the persons who purport to have signed and they were irrelevant, incompetent and pure hearsay as to defendant Canning. (165, 166)

ASSIGNMENT OF ERROR NO IV

The Court erred in denying the motion of defendant Canning to strike all the papers in Government's Exhibit No. 5, except the order showing the action of the Corporation Commission, for the reason that all other paper in said Government's Exhibit No. 5 were not properly identified, no proper foundation had been laid for their introduction, and as to defendant Canning they are pure hearsay. (166)

ASSIGNMENT OF ERROR NO. V

The Court erred in permitting the witness Willis Ethel to testify that he did not find in the records

of the Corporation Commission of Arizona any record of any permit having been issued to Raymond F. Marquis, George H. Cornes, Harry S. Marquis or Edgar G. Hamilton for the sale of stock in the State Securities Corporation over the objection and exception of defendant appellant, for the reason that such evidence was irrelevant, incompetent, immaterial and not the best evidence; that the records of the Corporation Commission were the best evidence and that the evidence sought as to defendant Earl Canning was pure hearsay, and that the same was highly prejudicial because under the law no permit was required in behalf of Raymond F. Marquis, George H. Cornes, Harry S. Marquis or Edgar G. Hamilton to sell their own stock. (166, 167)

ASSIGNMENT OF ERROR NO. VI

The Court erred in permitting the witness Willis Ethel to testify that he had made a search of the records of the Corporation Commission for financial statements, or annual reports by the State Securities Corporation and found none for the year 1933 and subsequent years, over the objection of defendant appellant, for the reason that such evidence is irrelevant, incompetent and immaterial and has no bearing upon the issues of this case whether financial statements were filed or were not filed, and can have no bearing on the indictment and any charge in the indictment, and not covered in the indictment or Bill of Particulars, and for the reason that such testimony was hearsay, not the best evidence and should be limited to the defendants to whom it is applicable. (167)

ASSIGNMENT OF ERROR NO. VIII

The Court erred in admitting in evidence Government's Exhibit No. 12, the purported cash journal of the Union Reserve Life Insurance Company for the year 1936, over the objection of defendant appellant, for the reason it had not been properly identified; that as to him there was no showing that he had anything to do with the bookkeeping system of the company and no showing that the company was the agent of defendant appellant; that as to him it was pure hearsay; that no proper foundation had been laid; that there was no showing that the entries appearing in the Exhibit were either original entries or first permanent entries of the transaction, which such Exhibit purports to portray; that there was no attempt to produce any of the persons who made original entries or persons having konwledge of the facts and said entries are not corroborated by any persons having personal knowledge of the facts, and no showing that such persons are dead, insane or beyond the reach of process; that said Exhibit was not admissible under Section 695, Title 28, USCA, for the reason that said act unconstitutionally attempts to shift the burden of proof from the government to the defendant; that said act is unconstitutional, null and void in that it violates the sixth amendment to the Constitution of the United States in that it deprives the defendant of the right to be confronted with the witnesses against him in that no opportunity has been offered to cross-examine the persons who are familiar with the accounts and transactions set forth in such Exhibit, or who made the original entries therein, so that the truth or accuracy of the statements in said Exhibit might be determined and, therefore, such document is pure hear-

say as to defendant appellant, and upon the further reason that under Section 695, Title 28, USCA no showing had been made that such Exhibit was made in the regular course of the business of the company, and no showing that it was the regular course of such business to make entries in such Exhibit at the time of the act, transaction, occurrence or event which such entries attempt to portray, or within a reasonable time after such act, transaction, occurrence or event took place, and the said Exhibit is not the best evidence and is hearsay. No materiality has been shown and it is irrelevant, incompetent and immaterial, being a book with a multitude of entries not shown to be in any way material to the issues of the case. (168, 169).

ASSIGNMENT OF ERROR NO. XIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, government's Exhibit No. 8, which is the journal of the Union Reserve Life Insurance Company from January 2, 1937, up to and including March 4, 1938, showing receipts and disbursements in detail of Union Reserve Life Insurance Company, for the reasons set forth as to the admissibility of government's Exhibit No. 12, assignment of error No. VIII above, and for the further reason that no proper foundation had been laid; that it was hearsay, irrelevant, incompetent and immaterial; that there was no showing of any materiality of anything connected in the book under the indictment or Bill of Particulars, and that the whole book was offered *without* specifying anything in it and it had no bear-

ing on the case without a statement or showing as to its materiality or relevancy. (177, 178).

ASSIGNMENT OF ERROR NO XIV

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 28 being a bundle of receipts for the payment of premiums, covering a portion of the year 1937, showing the amount of premium, when due, when received and by whom paid, for the reasons the said Exhibit had not been properly identified, no materiality was shown, and on the face of the Exhibit and items in the Exhibit it does not tend to prove any charge in the indictment, is hearsay, irrelevant, incompetent and immaterial as to defendant appellant. (178)

ASSIGNMENT OF ERROR NO. XV

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of the defendant appellant, Government's Exhibit No. 11 which is the journal of Union Reserve Life Insurance Company from May 6, 1932, to December 31, 1934, containing the record of cash receipts and disbursements of said Union Reserve Life Insurance Company during said period, for the same reasons set forth in the objections to Government's Exhibit No. 12, assignment of error No. VIII above. (178, 179)

ASSIGNMENT OF ERROR NO. XVI

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over

the objection and exception of defendant appellant, Government's Exhibit No. 10, the general cash journal beginning January 2, 1935, and ending December 31, 1935, showing the general cash receipts and disbursements of the Union Reserve Life Insurance Company for the year 1935, for the reasons assigned in the objections to Exhibit No. 12, assignment of error No. VIII above, and for the further reason that it appeared from the testimony of the witness King Wilson that this book had been kept by him and the Court had permitted the said witness to leave the jurisdiction of the Court and had thus deprived the defendant of his constitutional right under amendment sixth to the Constitution of the United States to be confronted with the witness against him, and the right to cross-examine that witness on documents introduced in evidence, and that it shifted the burden of proof from the government to the defendant. (179).

ASSIGNMENT OF ERROR NO. XVIII

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 9 for the same reasons set forth in the objection to Exhibit No. 12, assignment of error No. VIII, and for the further reason that the book purports on its face to have been started in 1930, long before there was any record that the defendants, or any of them, were connected in any manner with the Union Reserve Life Insurance Company, or its predecessor, and no materiality was shown and the book contained irrelevant, incompetent and immaterial matters and there was no showing that the book was kept in

the regular course of business, but on the contrary, it was shown that the entries were not made during the ordinary course of business but at a later date at the end of the year, and for the further reason that the witness King Wilson had been excused by the Court over the objection of defendant appellant from further attendance and thereby defendant appellant was deprived of his right of cross-examination. (180, 181)

ASSIGNMENT OF ERROR NO. XIX

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 7, which consists of annual reports of the Union Reserve Life Insurance Company to the Commissioner of Insurance of the State of Arizona for the years 1933, 1934, 1935 and 1936, containing the name of the company, where and on what date incorporated, the date of the commencement of business, the home office address, the names of the officers and directors, a statement of the capital stock and ledger assets and liabilities and other funds, amount paid for business, business in the State of Arizona for the past year and a profit and loss statement for the year together with a summary of the mortgages owned by the company for each year for which said statement was filed, all four books being marked with one Exhibit number and all containing identical information for the year for which it was filed, for the reason that the said reports were incompetent, irrelevant and immaterial; no foundation had been laid for their introduction; they were hearsay as to defendant appellant and no materiality had been shown. (181)

ASSIGNMENT OF ERROR NO XX

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 29 which consists of six bound volumes of duplicate check vouchers showing checks issued by the Union Reserve Life Insurance Company, the date issued, in whose favor drawn, to what bank directed, and the account for which said checks were drawn, being checks numbered 2583 to 3600, both inclusive, for the reason that no materiality was shown; as to defendant Earl Canning they are hearsay, immaterial, irrelevant and incompetent and for the further reasons set forth in assignment of error No. VIII as to Government's Exhibit No. 12 (182)

ASSIGNMENT OF ERROR NO. XXI

The Court erred in admitting in evidence on behalf of the plaintiff United State of America, over the objection and exception of defendant appellant, Government's Exhibit No. 30, being six volumes of check stubs, a part of the records of the Union Reserve Life Insurance Company covering the period from August 8, 1934, to June 5, 1935, showing the record of all of the checks issued by the Union Reserve Life Insurance Company during that period of time, for the reason that no materiality was shown; as to defendant Canning they are hearsay, incompetent, irrelevant and immaterial (182).

ASSIGNMENT OF ERROR NO. XXII

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 14, being the general ledger or agent's ledger of State Securities Corporation for the year 1933, showing receipts and disbursements of said corporation for that period of time, together with agent's commissions and bond transfers, for the reason that no proper foundation had been laid; it is hearsay, immaterial and incompetent and there has been no showing as to the correctness of it, and no showing that the witness identifying it, Ora T. Hill, knew anything about the book, except the few entries she had made herself. (183).

ASSIGNMENT OF ERROR NO. XXIII

The Court erred in admitting on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 17, being the cash book and journal of the investment department of the State Securities Corporation for the years 1931 to 1933, showing cash receipts and disbursements of investment department of said corporation, the legal reserve set up, notes and bonds owned, general ledger assets, a record of bonds sold on installments, commissions paid and record of fully paid up bonds, for the reason that no proper foundation had been laid for its introduction, no materiality was pointed out; it had not been properly identified; it was immaterial, irrelevant and incompetent and hearsay and no showing that it was kept in the ordinary course of business, but on the contrary the witness Ora T. Hill, through whom the government sought to identify the book for its introduction in evidence, testified that she could not identify the Government's Exhibit No. 17; that she never worked on that book; that she was not in

the office when any of the entries were made in that book, and not employed in the office at the time the book was kept, and that she did not know that the entries were made in the ordinary course of business. (183, 184)

ASSIGNMENT OF ERROR NO. XXIV

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 15, being a purported cash book and journal of the insurance department of State Securities Corporation for the year 1933, beginning April 1, 1933, and ending December 31, 1933, showing receipts and disbursements during said period, for the reason that no materiality had been shown in said book, or in any of the entries thereof. The said book contains voluminous entries, the materiality of none of which is shown and as to defendant appellant Canning, the said book is hearsay, immaterial, irrelevant and incompetent. (184)

ASSIGNMENT OF ERROR NO. XXV

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 19 which consists of ten books of stock certificate stubs and used and unused certificates of stock of State Securities Corporation, being all of the stock certificate books owned and used by said State Securities Corporation and showing the number of shares, to whom and when issued and the cancellation of all shares cancelled and re-issued, together with all other information relative to stock certificates, for the reason that no

proper foundation was laid for their introduction, no materiality was shown and as to defendant, Canning, they were hearsay, immaterial, irrelevant and incompetent. (184, 185)

ASSIGNMENT OF ERROR NO. XXVI

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 22 consisting of forty receipt books, showing carbon copies of receipts issued by State Securities Corporation for money received during all of the period of the life of said corporation, for the same reasons that the Court erred in admitting Exhibit No. 12, assignment of error No. VIII. (185)

ASSIGNMENT OF ERROR NO. XXVII

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 24, being twenty-three check books of check vouchers of Union Reserve Life Insurance Company, showing the dates of checks, to whom drawn, the amount and for what purposes, for the same reasons the Court erred in admitting government's Exhibit No. 12, set forth in assignment of error No. VIII, and for the further reason that no materiality was shown and as to the defendant Earl Canning the said check books are hearsay, incompetent, immaterial and irrelevant. (185, 186)

ASSIGNMENT OF ERROR NO. XXVIII

The Court erred in denying the motion of defendant appellant to strike Exhibit No. 22 from the evidence for the reason that the said receipt books were not properly identified and were pure hearsay, and there was nothing before the Court to show that they were kept in the ordinary course of business, and there was no identification of any writing, the witness having testified that many of the books were not kept while she was in the employ of the State Securities Corporation, and she had nothing to do with them until 1937 and she had no knowledge of the making of those receipt books at the time, nor any knowledge of the ordinary course of keeping books. (186)

ASSIGNMENT OF ERROR NO. XXIX

The Court erred in admitting in evidence on behalf of United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 40, which is a carbon copy of a letter dated June 27, 1932, to Mr. J. Owen Ambler, Kensington Gardens, 1002 North Mariposa, Los Angeles, California, and which is set forth in full in the Bill of Exceptions, for the reason that it was not the best evidence. There was no showing as to what became of the original letter, or whether or not it was lost. No foundation had been laid for its introduction; it was pure hearsay; it was not covered by the indictment or the Bill of Particulars, and there was no showing that defendant appellant had any knowledge of the writing of the letter, or that he had anything to do with it, and as to him it is pure hearsay, irrelevant, incompetent and immaterial. (187)

ASSIGNMENT OF ERROR NO. XXX

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, of that part of Exhibit No. 13 for identification consisting of the account under the name of L. Jo Hall, Lowell, Arizona, consisting of two pages beginning with the entry dated June 29, 1930, and the last entry being dated January 17, 1936, for the reason that no proper foundation had been laid for the introduction of the Exhibit; it is hearsay; it is not shown to have been kept in the ordinary course of business and is incompetent, immaterial and irrelevant for any purpose in the case. (187)

ASSIGNMENT OF ERROR NO XXXI

The Court erred in admitting in evidence on behalf of United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 18, being the purported cash book of Marquis, Cornes & Marquis, showing transactions, cash received, disbursements, agent's commissions, etc., for the reasons the Court erred in admitting government's Exhibit No. 12 set forth in assignment of error No. VIII above, and for the further reason that it is incompetent, irrelevant and immaterial, purporting to be a book kept from 1929 to 1932 inclusive, far beyond the period of limitation; no showing that it is complete and is not claimed as a book kept in the ordinary course of business in either of the corporations mentioned in the indictment. It was not properly identified and no foundation laid for its introduction. (188)

ASSIGNMENT OF ERROR NO. XXXII

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of the defendant appellant, Government's Exhibit No. 21 consisting of seventy-eight packages and envelopes, being two pasteboard boxes containing cancelled checks and bank statements of State Securities Corporation, for the same reasons the Court erred in admitting Government's Exhibit No. 12 set forth in assignment of error No. VIII, and for the further reason that there was no evidence that the Exhibit contained all of like records of the company at that time. (188, 189)

ASSIGNMENT OF ERROR NO. XXXIII

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of the defendant appellant, Government's Exhibit No. 23, being one pasteboard box of check stubs of State Securities Corporation, for the same reasons the Court erred in admitting Government's Exhibit No. 12, set forth in assignment of error No. VIII. (189)

ASSIGNMENT OF ERROR NO. LIX

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over objection and exception of the defendant appellant, Government's Exhibit No. 57 and Government's Exhibit No. 58, being, respectively, a certificate for 600 shares of the capital stock of State Securities Corporation, issued to L. Jo Hall, June 29, 1930, and check dated August 18,

1930, drawn to the order of State Securities Corporation, signed by L. Jo Hall, in the sum of $6,000, for the reason that as to defendant Canning the said exhibits, and each of them, are irrelevant, incompetent and immaterial, hearsay, no proper foundation laid, and not set forth in the indictment or in the bill of particulars. (202)

ASSIGNMENT OF ERROR NO. LXVII.

The Court erred in denying the motion of defendant appellant, made at the close of Government's case, to strike from the evidence Government's Exhibits numbered 8, 9, 10, 11, 12, 14, 15, 16, 17, and 18, severally and separately, they being the books and records of the companies, for the reasons that no proper foundation had been laid for their introduction; there was no showing that this defendant had any charge of the bookkeeping system, as to him they are hearsay, incompetent, irrelevant and immaterial. (208)

SUBDIVISION NO. VI OF ARGUMENT

ASSIGNMENT OF ERROR NO. LXIX

The Court erred in permitting the witness E. P. Hair to testify in rebuttal, over the objection and exception of the defendant appellant, concerning entries in the books of Marquis, Cornes and Marquis, and in the cash book of Union Reserve Life Insurance Company, concerning business transactions purportedly had with J. Elmer Johnson, for the reason that said testimony was not proper rebuttal, no question having been asked in the Government's case concerning any business transactions with the said J. Elmer Johnson, such transac-

tions not having been referred to in the indictment or in the bill of particulars, such testimony was not offered for impeachment purposes of any witness, no foundation had been laid for its introduction and it was highly prejudicial. (209)

ASSIGNMENT OF ERROR NO. LXX.

The Court erred in admitting evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 67, which purports to be a balance sheet of State Securities Corporation as of January 31, 1931, prepared by Government's witness Hair for the reason that said exhibit was not proper rebuttal evidence, does not purport to be accurate and correct, and is irrelevant, incompetent and immaterial and pure hearsay. (209, 210)

ASSIGNMENT OF ERROR NO. LXXI.

The Court erred in admitting in evidence, on behalf of the plaintiff, United State of America, over the objection and exception of defendant appellant, Government's Exhibit No. 68, which is in full substance as follows:

GOVERNMENT'S EXHIBIT NO. 68

March 26, 1937

Mr. G. L. Reay
R. F. D.
Winkleman, Arizona

Dear Mr. Reay:

I am in receipt of letter from J. Elmer John-

son stating that he had requested you to call at this office in regard to mortgage held by this company on ninety (90) acres of land owned by Mr. Johnson and yourself.

We have been expecting you, but up to this date we have not had the pleasure of your visit. It is necessary that some adjustment of this past-due matter be made; hence I am asking that upon receipt of this letter that you give personal attention to the item.

I am enclosing a stamped, addressed envelope for you convenience in advising when you can meet me at our office.

Very truly yours,

R. F. MARQUIS
Secretary-Treasurer

RFM:MD

for the reason that no proper foundation had been laid for its introduction as against the defendant appellant Canning, as to him it is pure hearsay, irrelevant, incompetent and immaterial. (210, 211)

SUBDIVISION NO. VII OF ARGUMENT

ASSIGNMENT OF ERROR NO. LXIV.

The Court erred in denying the motion of defendant appellant made at the close of the government's case that the Court direct the jury in said cause to return a verdict for the defendant appellant finding him not guilty on each and every count of the indictment, including the sixth count, upon the ground and for the reason that

there was no substantial evidence to sustain the charges made in the several counts of the indictment, and particularly the sixth count of the indictment, in that,

(a) There was no substantial evidence to show that the defendant appellant devised any scheme to defraud, or ever took any part in any scheme to defraud, or to obtain money and property by means of false and fraudulent pretenses, representations and promises as charged in the indictment.

(b) There was no substantial evidence to show that defendant appellant ever conspired, combined, confederated, or agreed with any of the other defendants, or any other person, to commit any of the divers offenses charged against defendants in the divers counts of the indictment, or to use the Post Office establishment of the United States in the commission of any of the offenses or ever performed any act of the offenses, or ever performed any act to effect the object of said unlawful and felonious conspiracy.

(c) It was affirmatively shown in the government's case that the defendant appellant was not an officer, director or stockholder of any of said companies; that he took no part in and had nothing to do with the management, control and policies of any of the other defendants, or any of said companies.

(d) His only connection was that he did occasional auditing work and bookkeeping work for the said companies, and that he was paid therefor only the usual and customary charge for his time and had not been paid all that was owed to him on that basis.

(e) There was no evidence that defendant appellant ever assisted or attempted to assist any of the defendants in the sale of any stock, bonds or other securities, and it was conclusively shown that he did not profit by any such sale of bonds or other securities.

(f) There was no evidence that any statement made by defendant appellant was made fraudulently or with any intent to defraud, but on the contrary it was shown by the Government's witnesses that the statements, as made, truly reflected the figures in the books which they purported to reflect.

(g) There was no evidence of any criminal intent on the part of the defendant appellant Canning. (205, 206, 207)

ASSIGNMENT OF ERROR NO. LXXII.

The Court erred in denying the motion of defendant appellant made at the close of all the evidence that the Court direct the jury in said cause to return a verdict for defendant appellant, finding him not guilty as to each and all of the counts of the indictment, separately and severally, including Count Six, upon the ground and for the reason that there was no substantial evidence to sustain the charge made in any count of the indictment, including Count Six, separately and severally, in that:

(a) There was no substantial evidence to show that the defendant appellant devised or intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises as charged therein, nor that

he aided and abetted in any such scheme or artifice to defraud, or conspired with any of the other defendants, or with any other person whomsoever to obtain money and property by means of false and fraudulent pretenses, representations and promises, and to use the mails in furtherance thereof, or otherwise;

(b) There was no substantial evidence to show that defendant appellant ever made or aided or assisted in making any representations and promises in the sale of stock and bonds, true or false, or otherwise;

(c) There was no substantial evidence of any intent on the part of defendant appellant to defraud or to obtain money and property by means of false and fraudulent pretenses, representations and promises, or otherwise;

(d) On the contrary, the evidence shows that the defendant appellant had nothing to do with the control, management or policy of any of the companies involved, or of any of the other defendants; that he was never an officer, stockholder or director of any said companies, and did not participate therein, nor profit therefrom or thereby, except that he did occasional auditing and bookkeeping work for said companies for which he charged on a time basis his regular rates, and that he had not been paid all he had earned;

(e) There was no substantial evidence to show that the defendant appellant ever had any knowledge of or aided or assisted in the making of any false and fraudulent representations by any person whomsoever;

(f) There was no substantial evidence to show that the defendant appellant ever conspired or intended to conspire with either of the other defendants, or with any other person, to commit any offense or perform any acts in aid of any scheme or device to defraud or to obtain money and property by means of false and fraudulent pretenses, representations and promises. (211, 212, 213)

SUBDIVISION NO. VIII. OF ARGUMENT

ASSIGNMENT OF ERROR NO. LXXIV

The Court erred in overruling the exception and objection of defendant appellant to that portion of the instruction given by the Court to the jury as follows:

> "It is the law that when the defendants, or either of them, incorporate statements or representations of others in his or their literature or printed matter, he or they adopt them as their own, and in such work they are responsible for such statements and representations,"

for the reason that said instruction is confusing and misleading and incorrectly states the law, without the additional qualification, "that he is responsible if he has knowledge of their falsity". (213, 214)

ASSIGNMENT OF ERROR LXXV.

The Court erred in instructing the jury as follows:

> "The defendants in this case, gentlemen, are entitled to the individual opinion of each juror, and no juror should vote for the conviction of a defend-

ant as long as he entertains a reasonable doubt of the defendant's guilt, notwithstanding the opinions of others of the jury. You note, gentlemen, that a juror qualifies himself to make up his judgment only after he has given fair, full, impartial and candid consideration of the facts in evidence. This means that he should bring to bear upon the question, not only his power of mind, but that he should freely consider the views of his fellows. A criminal case is not submitted to jurors as individuals. No one juror is legally competent to decide it adversely to the defendant on trial. It is submitted to the jury as a deliberative body, whose judgments are worthy only when they are produced by the contributions of a right solution of each member. Each juror, therefor, should not only attempt to think out a solution for himself, but he should allow his fellows to assist his thinking. Even though having arrived at an opinion, he should consider with an open mind the diverse opinions of others. He should test his conclusions by the views of his fellows, but also to listen to the advice of others. In theory, at least, gentlemen, a hung jury is seldom possible if every juror give the same degree of fair and candid and coolheaded consideration to the case. That is so, because the processes of reasoning and common sense are fairly uniform with men of average ability and reasonableness; and to such who are only competent for jury service, facts speak with much the same force. It is seen that the doctrine of reasonable doubt, therefore, is not a bug-a-boo, not a convenient excuse to avoid doing something unpleasant; not a cover for stubbornness, but simply a call

to candid and fairminded man to be careful and not decide until they are convinced of the guilt of the individual, as charged, to a moral certainty. When you are convinced to a moral certainty, not an absolute certainty, but to a moral certainty, you are convinced beyond a reasonable doubt. The terms are convertible.

"As jurors, you apply to the work before you the same method of reasoning and the same standard of comparison of the weight of facts clearly established in the evidence as you would apply under equivalent conditions to a problem before you for solution in private life. In both situations, your plain common sense, the education your experience and observations have brought you, are available with just the same degree of usefulness. Nothing results from your oath requiring you to reason differently or change your mature method of reasoning from the course you would pursue in your private affairs in determining a serious question. The effect of your official position as jurors is to face you with an obligation to calmly and seriously study the evidence, to ascertain the clear existence of fundamental facts asserted to have been shown in the evidence and to correlate them properly into a line of proof so that, as jurors, you are able to say that the ultimate facts of the guilt charged against a defendant is shown to a moral certainty, whereas, if it were a private matter, you might be satisfied with a solution which is supported by a mere preponderance of evidence."

to which instruction defendant appellant duly excepted for the reason that the said instruction does not correctly state the law as to the duty of jurors and is contradictory and misleading. (214, 215, 216)

ASSIGNMENT OF ERROR NO. LXXVI.

The Court erred in instructing the jury as follows:

"The respective sections of the statute applicable to this case are acts of Congress. It is no concern of the United States how many frauds are committed in this state, or in any other state not connected with the United States mails, because the Constitution of the United States does not give Congress the right to interfere with such matters. It leaves the exercise of that power entirely with the state. But Congress has adopted the method which at least affects it in some measure, and this is by the medium of a law relating to the mails. Over the United States mails, the Government has, of course, full control, and has the right to see that they shall not be used as an intrument to further any scheme to defraud. It does not punish the fraud; it punishes a party for using the mails to defraud. In other words, the gist of the offense is the use of the mails. The policy of the United States is to prevent the misuse of the mails of the United States in the furtherance of dishonest schemes or swindles. The Government intends that the post office establishment shall be used by the people for the purpose of legitimate business and social intercourse, and that it shall not be used for the purpose of furthering dishonest schemes or practices."

to which instruction the defendant appellant duly excepted, for the reasons that the instruction does not correctly state the law and is confusing and misleading and leaves an inference that fraud had and does exist, regardless of the evidence, and over emphasizes the question of fraud. (217, 218)

ASSIGNMENT OF ERROR NO. LXXVII

The Court erred in instructing the jury as follows:

> "As I have already pointed out, the first five counts of the indictment charge as a part of the scheme to defraud, various false representations, pretenses and promises alleged to have been made by the defendants, or some of them, as a part of the scheme. The Government need not prove that the scheme was fraudulent in its inception, nor that any defendant who entered upon the execution of the enterprise did so with a present intention to participate in the alleged fraudulent scheme or practices."

to which instruction the defendant appellant duly excepted, for the reason that the said instruction does not correctly state the law or any charge of conspiracy. The intent to defraud is a necessary element, which must have existed at the time of the inception of the conspiracy in the mind of the accused. (218)

ASSIGNMENT OF ERROR NO. LXXVIII.

The Court erred in instructing the jury as follows:

> "You should understand gentlemen, and I think it is especially important in this case you should

> understand that the terms of the act are such that fraud attempted in the execution of a plan or scheme whose aims are worthy is within its provisions. That is to say, that if one in charge of a legitimate business conceives a plan to promote it by fraudulent acts, and then, to help the fraudulent conception, he uses the mails, he becomes liable, no matter whether the object for which the fraudulent act is done is good or whether the intention is to benefit in the end the man deceived."

to which instruction the defendant appellant excepted for the reason that said instruction incorrectly states the law; is ambiguous and misleading and not complete and ignores the necessary element of an intent to defraud.

ASSIGNMENT OF ERROR NO. LXXIX.

The Court erred in instructing the jury as follows:

> "One or more persons may form and accomplish an offense as charged in the first five counts of this indictment, with or without assistance, but all who, with criminal intent, or with knowledge of the criminal character of the enterprise, join themselves even slightly to the principal members, are subject to the statute, though they may know nothing but their own share in the aggregate wrongdoing. This applies to employees, if such employees have knowledge of the unlawful scheme or artifice to defraud.
>
> "It is the duty of an employee to know the nature of the busines being transacted by his principal, and if it is brought to his knowledge and he ascertains that the law is being violated by his prin-

> cipal, and he still continues in such employment, and by his work and labor, though such work and labor may be merely routine, he is regarded as a principal in whatever criminal acts may be commited, and punishable as such."

to which instruction the defendant appellant duly excepted for the reasons that the said instruction incorrectly states the law; is not complete and does not fully cover the question of employees and others and their necessary intent to participate in a fraudulent scheme, and is confusing and misleading. (219, 220)

ASSIGNMENT OF ERROR NO. LXXX.

The Court erred in instructing the jury as follows:

> "The law permits a defendant in a criminal case at his own request to testify in his own behalf. The defendants herein have availed themselves of this right. Their testimony is before you and you may consider how far it is credible. The deep personal interest which they have in the result of this case may be considered by you in weighing their evidence and in determining how far, or to what extent, if at all, it is worthy of credit. In considering the credibility of, or weight which you should attach to the testimony of a defendant, you should regard, among other things, the inherent probability or improbability of their statements, and to what extent the same have been corroborated or contradicted by other evidence in the case, whether documentary or oral. Where a witness has a direct personal interest in the result of a case, especially in a criminal case,

> the temptation may be strong to color, pervert or withhold the facts."

to which instruction the defendant appellant duly excepted for the reason that the last sentence of said instruction, taken in connection with the said instruction, lays too much stress upon the the interest of a defendant and in effect instructs the jury to regard his testimony with suspicion and is highly prejudical. (220, 221)

ASSIGNMENT OF ERROR NO. LXXXI.

The Court erred in refusing to give to the jury defendant appellant's requested instruction No. 9 as follows:

> "The Court instructs the jury that where two or more wholly separate and distinct acts are charged against all of the defendants in one count of an indictment it is necessary, before you can arrive at a verdict of guilty as to any defendant, that you should believe beyond a reasonable doubt and to a moral certainty that any such defendant feloniously participated in both or all of such events or transactions charged in the indictment as constituting a single offense.
>
> *Beaux Arts Dresses v. United States*, 9 Fed. (2d) 531, 533."

to which refusal the defendant appellant duly excepted for the reasoin that the said instruction correctly states the law and is applicable to the evidence in this case, and the refusal to give this instruction, taken in connection with the instructions the Court did give, permitted the

jury to arrive at a verdict of guilty as to this defendant without believing beyond a reasonable doubt and to a moral certainty that he feloniously participated in the events or transactions charged in the indictment and particularly the sixth count thereof. (221, 222)

ASSIGNMENT OF ERROR NO. LXXXII.

The Court erred in refusing to give to the jury defendant appellant's requested instruction No. 10 as follows:

> "The Court instructs you that before you can convict in this case you must find that the defendants or some of them combined and confederated together, prior to the mailing of the letter set out in the indictment, or that after the fraudulent scheme, if any there was, formed by some of the defendants, other defendants, not parties to the original scheme, joined it with guilty knowledge of its false character and aided it by mailing or causing to be mailed the letter set out in the indictment in execution thereof. The existence of a scheme to defraud is a necessary prerequisite or condition to the commission of the offense.
>
> *United States v. Bachman,* 246 Fed. 1009."

to which refusal the defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in the case, (222, 223)

ASSIGNMENT OF ERROR NO. LXXXIII.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 11 as follows:

"You are instructed that, where a conviction for a criminal offense is sought upon circumstantial evidence, the prosecution must not only show by evidence beyond a reasonable doubt that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation, upon any reasonable hypothesis, other than that of the guilt of the accused, before a verdict of guilty can be found.

"In this class of cases the jury must be satisfied, beyond a reasonable doubt, that the offense charged had been commiteed (by some one of the defendants) in the manner and form as charged in the indictment, and then they must not only be satisfied that all the circumstances proved are consistent with the defendant having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that such defendant is the guilty person, before a verdict of guilty can be found. It is your first duty to determine from the evidence what facts and circumstances are thereby established, and then to draw from such facts and circumstances, after carefully examining and weighing them, your conclusions as to the guilt or innocence of such defendant. It is your duty to exercise great care and caution in drawing conclusions from proved facts. Such conclusions must be fair and natural and not forced and artificial. Unless all facts and circumstances taken together are of such

a conclusive nature as to establish beyond a reasonable doubt that the accused is guilty as charged, then he must be acquitted. It is not sufficient that conclusions create a probability of guilt, though a strong one, and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proofs fail. It is essential, therefore, that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. If then, all the facts and circumstances established by the evidence beyond a reasonable doubt can be reconciled with any reasonable hypothesis of any defendant's innocence, then it is your duty to acquit such defendant.

State v. Novak, 109 Ia. 717 (79 N. W. 465)"

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case and defendant appellant was entitled to have the same given to the jury. (223, 224, 225)

ASSIGNMENT OF ERROR NO. LXXXIV.

The Court erred in refusing to give the jury defedant appellant's requested instruction No. 12 as follows:

"I have stated to you that the offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such character as to exclude

every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or in other words, the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

United States v. Richards, 149 Fed. 443, 454,

Terry v. United States, 7 Fed. (2d) 28."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (225, 226)

ASSIGNMENT OF ERROR NO. LXXXV.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 13 as follows:

> "You are instructed that as to defendant Earl Canning you must consider the evidence given as it relates to him specifically and determine whether or not you are satisfied beyond a reasonable doubt that he, with intent to defraud, knowingly participated in any criminal act or aided or abetted in the commission of any criminal act charged in the indictment."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (226, 227)

ASSIGNMENT OF ERROR NO. LXXXVI.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 14 as follows:

> "The Court instructs the jury that where all of the circumstantial evidence is as consistent with innocence as with guilt, a verdict of guilty cannot be rendered."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (227)

ASSIGNMENT OF ERROR NO. LXXXVII.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 16 as follows:

> "I further instruct you that even though you may find from the evidence that the representations made in the letters and circulars received in evidence on the part of the United States were untrue, nevertheless, if the defendants, or any of them, believed and had reason to belive such representations to be true, no matter how inaccurate such belief may turn out to be, such belief would be a complete defense.

Horne v. United States, 182 Fed. 721,

Rudd v. United States, 173 Fed. 914,

Harrison v. United States, 200 Fed. 662."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (227, 228)

ASSIGNMENT OF ERROR NO. LXXXVIII

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 18 as follows:

> "The Court instructs the jury that it is not enough, in order to find a defendant guilty thereof, nor even that you believe that there is a strong probability of guilt. It is essential that you believe any such defendant guilty beyond all reasonable doubt, and such belief must be induced by facts and circumstances appearing on the trial which may be considered by you in view of your experience with the ordinary affairs of life."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have same given to the jury. (228)

ASSIGNMENT OF ERROR NO. LXXXIX

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 22 as follows:

> "You are further instructed that the burden is upon the Government to prove beyond a reasonable doubt and to a moral certainty as to each defendant that he, or they, or some one under the direction of one or more of the defendants, deposited the mail matter charged as constituting an offense, in the United States Mails."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (229)

ASSIGNMENT OF ERROR NO. XC

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 26 as follows:

> "You are instructed that evidence of good character of defendant Earl Canning has been received. This evidence is as proper for your consideration as that of any other fact in the case and the weight to be given such evidence is in your hands. Proof of good character in connection with all the other evidence in the case may generate a reasonable doubt, which entitles the defendant Earl Canning to an acquittal, even though without such proof of good character the jury would convict him.
>
> *Apodoca v. State*, 21 Ariz. 273,
>
> *Bryant v. State*, 116 Ala. 446, 23 So. 40,
>
> *Sunderland v. U. S.* 18 Fed. (2d) 202, 214, 216,

Nanfito v. U. S. 20 Fed. (2d) 376,

Cohen v. U. S. 282 Fed. 871,

Suitkin v. U. S. 265 Fed. 489,

Edginton v. U. S. 164 U. S. 361, 17 S. Ct. 72, 41 L. Ed. 467."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have same given to jury. (229, 230)

ASSIGNMENT OF ERROR NO. XCI.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 27 as follows:

> "You are instructed that even if you should find beyond a reasonable doubt that financial statements made by defendant Earl Canning were erroneous, still you cannot convict him on any count unless you are satisfied that at the time he made them, he knew they were false and fraudulent and that he knowingly made them with intent to defraud, and unless you are so satisfied beyond a reasonable doubt you must return a verdict of not guilty for defendant Earl Canning on each and every count of the indictment."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in his case, and defendant appellant was entitled to have the same given to the jury. (230, 231)

ASIGNMENT OF ERROR NO. XCII.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 28 as follows:

> "You are instructed that the only evidence offered against defendant Earl Canning is that he at times kept the books and made certain financial statements for State Securities Corporation and Union Reserve Life Insurance Company. Unless you are satisfied beyond a reasonable doubt that he, with intent to defraud, knowingly made false and fraudulent financial statements, then you must, as to him, return a verdict of not guilty on each count of the indictment."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (231)

ASSIGNMENT OF ERROR NO. XCIII.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 29 as follows:

> "The Court instructs the jury that you cannot consider any evidence offered by the Government as binding upon the defendant Earl Canning if the Government has failed to connect said defendant with such evidence, or with events or transactions which any such evidence attempts to prove."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the

law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (232)

ASSIGNMENT OF ERROR NO. XCIV.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 30 as follows:

> "You are further charged that the burden is on the Government to prove, beyond a reasonable doubt, and to a moral certainty, the fraudulent character of the scheme set out in the indictment, and that it was so fraudulent from the beginning.
>
> *Colburn v. United States*, 223 Fed. 590,
>
> *Brooks v. United States*, 146 Fed. 223."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury.

ASSIGNMENT OF ERROR NO. XCV.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 31 as follows:

> "You are instructed that the defendants in a criminal case are not required to satisfy the jury of the existence of any fact, which, if true, is a complete defense. It is sufficient if such defendants create in the minds of the jury a reasonable doubt of the existence of such fact.
>
> *Hinshaw v. State*, 47 N. E. 157."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (233)

ASSIGNMENT OF ERROR NO. XCVI.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 32 as follows:

> "The Court instructs the jury that it is the duty of each and every member of the jury in this case to decide the issues presented for himself, and if, after a careful consideration of all of the evidence of the case, and the instructions of the Court on the law and a free consultation with his fellows, there is any single juror who has a reasonable doubt of the defendant's guilt, it is his duty, under his oath, to stand by his conviction and favorable to a finding of not guilty. He should never yield his convictions simply because some or even all of the other jurors may disagree with him.
>
> *Redman v. U. S.* 77 Fed. (2d) 126, 129 (CCA 9),
>
> *Ammons v. State*, 42 Sou. 165,
>
> 3 *Randall's Instructions to Juries*, Page 2301,
>
> *Berger v. U. S.* 62 Fed. (2d) 438, 77 Fed. (2d) 720."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and de-

fendant appellant was entitled to have the same given to the jury. (233, 234)

ASSIGNMENT OF ERROR NO. XCVII.

The Court erred in modifying defendant appellant's requested instruction No. 21 which was submitted in the following form:

> "You are instructed that with respect to the declarations of one defendant made by him outside of the presence of any other defendant that before such declarations are competent as to any such absent defendant, it must be proved beyond a reasonable doubt, by independent evidence, that the scheme or artifice to defraud alleged in the indictment had been devised, and that such absent defendant was a party thereto. It must further be established beyond a reasonable doubt that such declaration was made by such defendant in furtherance of said scheme or artifice. It is only where knowledge and active participation, or an express or implied ratification of the alleged fraudulent scheme or device can be proved, that one defendant is bound by the statements or declarations of another. The fact that the declarations were made before a defendant may have become associated with an alleged scheme or conspiracy, if any there was, does not of itself render the declarations unadmissible against him.
>
> *Wallace v. United States*, 245 Pac. 300,
>
> *United States v. Babcock*, 3 Dillon 581,
> *Miller v. United States*, 133 Fed. 337, at 353,
>
> *Pope v. United States*, 289 Fed. 312."

by striking therefrom the last three sentences thereof and giving said instruction in the following form:

> "You are instructed that with respect to the declarations of one defendant made by him outside of the presence of any other defendant, that before such declarations are competent as to any such absent defendant, it must be proved beyond a reasonable doubt, by independent evidence, that the scheme or artifice to defraud alleged in the indictment had been devised and that such absent defendant was a party thereto."

to which modification this defendant appellant duly excepted for the reason that the instruction as requested correctly states the law and is applicable to the evidence in this case, and the defendant was entitled to have presented to the jury the law of the case as applicable to him and by its modification and refusal to give the part of the instruction the Court withdrew from the jury, it permitted the jury to find a verdict of guilty without finding that the defendant appellant had any knowledge or actively participated in or expressly or impliedly ratified any fraudulent scheme or device. (234, 235, 236)

SUBDIVISION NO. IX OF ARGUMENT

ASSIGNMENT OF ERROR NO. IV

The Court erred in denying the motion of defendant Canning to strike all the papers in Government's Exhibit No. 5, except the order showing the action of the Corporation Commission, for the reason that all other papers in said Government's Exhibit No. 5 were not properly identified, no proper foundation had been laid

for their introduction, and as to defendant Canning they are pure hearsay. (166)

ASSIGNMENT OF ERROR NO. VII.

The Court erred in denying defendant appellant's motion to strike the question put to the witness Willis Ethel relative to finding anything in the Corporation Commission's records relating to a permit issued to Raymond F. Marquis, Harry S. Marquis, George H. Cornes and Edgar G. Hamilton for the sale of stock, and the witness's answer to that question, for the reason that it is nowhere charged in the indictment that the failure to secure the permit was any part of the scheme to defraud, nor any part of the action taken to defraud; that the same was inadmissible and outside the issues of the case. (167, 168)

ASSIGNMENT OF ERROR NO. XVII.

The Court erred in denying the motion of defendant appellant Canning to strike from the evidence Government's Exhibits No. 10, 11, 12 and 19, for the reason that the constitutional rights of this defendant appellant to cross-examine witness King Wilson, who had testified he kept the books concerning entries made therein by him, had been denied by the Court in excusing the Govment witness King Wilson from further attendance upon said trial, and for the further reason that no materiality of the entries in said books had been shown. (179, 180)

ASSIGNMENT OF ERROR NO. XXVIII.

The Court erred in denying the motion of defendant appellant to strike Exhibit No. 22 from the evidence for

the reason that the said receipt books were not properly identified and were pure hearsay, and there was nothing before the Court to show that they were kept in the ordinary course of business, and there was no identification of any writing, the witness having testified that many of the books were not kept while she was in the employ of the State Securities Corporation, and she had nothing to do with them until 1937 and she had no knowledge of the making of those receipt books at the time, nor any knowledge of the ordinary course of keeping books. (186)

ASSIGNMENT OF ERROR NO. LXV.

The Court erred in denying the motion of defendant appellant made at the close of the Government's case, to strike from the evidence all of the parts of the Government's Exhibits No. 26 and No. 27 for identification, which had been marked and put in evidence, they being the purported minutes of State Securities Corporation and Union Reserve Life Insurance Company, respectively, for the reason that as to defendant Canning they are hearsay and no foundation was laid for their introduction; they were not properly identified; there was no showing that the minutes were kept in the regular course of business of the two companies, but on the contrary the evidence shows that they were written up at the end of the year. There was no showing that they had ever been communicated to defendant appellant Canning or that he had any knowledge thereof. (207)

ASSIGNMENT OF ERROR NO. LXVI.

The Court erred in denying the motion of defendant appellant Canning made at the close of the Government's

case, to strike severally and separately from the evidence Government's Exhibits numbered 4, 5, 6, 28, 39, 40, 41, 42, 43, 44, 45, 46, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 and 63, for the reason that they, and each of them, separately and severally were irrelevant, incompetent and immaterial, too remote, not the best evidence, no foundation had been laid for their introduction and as to defendant appellant they, and each of them, are hearsay. (207, 208)

ASSIGNMENT OF ERROR NO. LXVII.

The Court erred in denying the motion of defendant appellant, made at the close of Government's case, to strike from the evidence Government's Exhibits numbered 8, 9, 10, 11, 12, 14, 15, 16, 17 and 18, severally and separately, they being the books and records of the companies, for the reasons that no proper foundation had been laid for their introduction; there was no showing that this defendant had any charge of the bookkeeping system, as to him they are hearsay, incompetent, irrelevant and immaterial. (208)

ASSIGNMENT OF ERROR NO. LXVIII.

The Court erred in denying the motion of defendant appellant, made at the close of the Government's case, to strike from the evidence all of the testimony of the witness Hair, for the reason that the witness testified that some of the figures which he presented to the Court he got from sources other than the books and records in evidence and upon which figures and testimony, so obtained, he could not be cross-examined, and such testimony constitutes hearsay because not based upon

facts, or books or records in evidence, and as to defendand appellant his testimony is hearsay, incompetent, irrelevant and immaterial. (208, 209)

ASSIGNMENT OF ERROR NO. LXXIII.

The Court erred in denying the motion of defendant appellant, made at the close of all of the evidence, to strike all testimony given in the case of events claimed to have transpired subsequent to January 1, 1938, for the reason that, under Count Six, the conspiracy count in the indictment, the alleged conspiracy was alleged to have ended on January 1, 1938, and any events subsequent to such date would be wholly irrelevant, incompetent and immaterial and pure hearsay, and without the bounds of the indictment or the bill of particulars as it affects Count Six, the conspiracy charge. (213)

No. 9531

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For the Ninth Circuit

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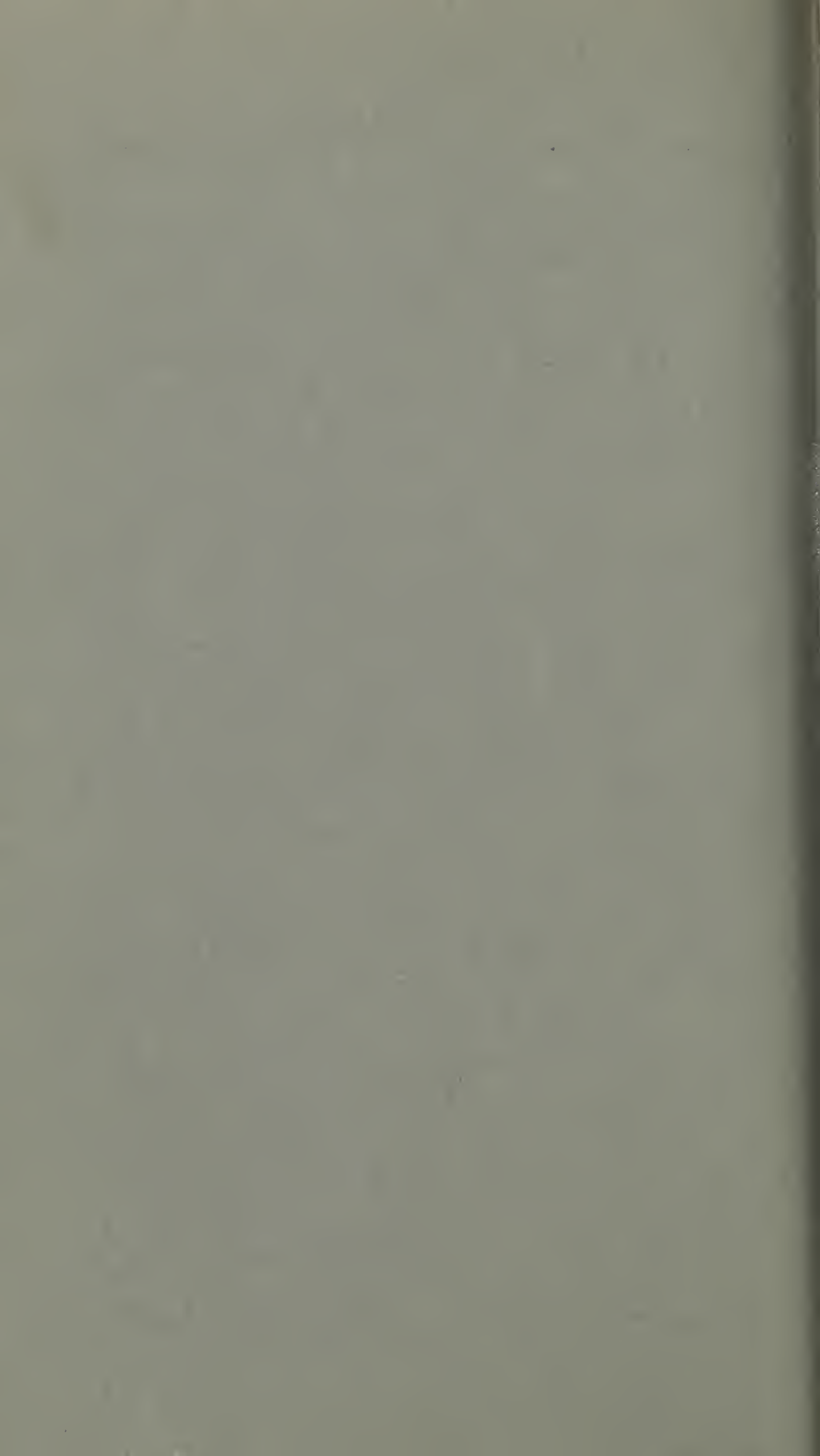

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Brief for Appellee

STATEMENT

Appellant's brief presents nine questions (pp. 22-24). We will take them up in the same order in which they appear in appellant's brief. In discussing some of the questions raised, it will be necessary to refer to testimony of some of the witnesses insofar as it affects the appellant Canning. In the interest of brevity we

shall, therefore, make no statement of the facts at this time, as we feel that our later reference to the facts will be sufficient for this Court to determine all the questions raised.

ARGUMENT

I.

(Appellant's Brief, pp. 24-30)

IS THE INDICTMENT FATALLY DEFECTIVE?

Appellant's first attack on the indictment is based on the use of the word "would". It is contended that the indictment fails to allege that the defendants ever did any of the things which the indictment alleges the scheme contemplated they would do.

In an indictment charging violation of the mail fraud statute, it is only necessary to allege that a scheme was devised to obtain money by false or fraudulent pretenses, representations or promises. It is not necessary to allege the success of the scheme or that any of the things contemplated were actually performed. The devising of the scheme and the use of the mails in furtherance thereof complete the offense. The use of the mails is the gist of the offense.

Brady v. *United States,* 24 F. (2d) 399;

Hass v. *United States,* 93 F. (2d) 427.

This indictment is not measured by the same rule as one charging the obtaining of money under false pretenses.

Emanuel v. *United States,* 196 Fed. 317.

In the present case, defendant Canning was convicted on the Sixth Count of the indictment charging conspiracy. In that count the overt acts are alleged.

The appellant also attacks the indictment on the ground that it is duplicitous. The indictment charges but one scheme—that was the scheme for sale of the stock and securities of the State Securities Corporation by false and fraudulent representations. The purchase or the organization of a life insurance company was not another scheme but merely one of the means used for the carrying out of the scheme for the sale of the securities of the State Securities Corporation. We quote from the indictment:

> "It was further a part of said scheme and artifice to have the State Securities Corporation purchase and obtain control of the Insurance Company, for the purpose of aiding said defendants in the sale of stocks and bonds of said Corporation to the persons to be defrauded by means of false and fraudulent pretenses, representations and promises." (4)*

Appellate courts have upheld similar indictments.

Silkworth v. *United States,* 10 F. (2d) 711;

Hass v. United States, supra;

Sunderlan v. *United States,* 19 F. (2d) 202;

Scheib v. *United States,* 14 F. (2d) 75;

*Where figures alone appear they refer to pages in the Transcript of Record.

II.

(Appellant's Brief, pp. 31-34)

DID THE COURT ERR IN OVERRULING THE OBJECTIONS OF APPELLANT TO THE BILL OF PARTICULARS AS FURNISHED BY THE GOVERNMENT AND DENYING APPELLANT'S REQUEST FOR A FURTHER BILL OF PARTICULARS?

The granting of a bill of particulars, or the extent to which a bill of particulars should be furnished, is within the sound judicial discretion of the trial court.

Muench v. *United States,* 96 F. (2d) 332;

Hass v. *United States,* supra;

Stumbo v. *United States,* 90 F. (2d) 828.

We wish to point out that in this case the bill of particulars furnished was not upon order of the Court. When the demand for a bill of particulars was filed, the Government, in order to narrow the issues and save the time of the Court in going over each demand, furnished the appellant and other defendants with the bill of particulars in this record. The appellant thereupon filed objections to the bill furnished and demanded a further bill of particulars. It was upon this objection and demand that the Court entered its order denying the request for a further bill.

In the demand for a bill of particulars, there is much repetition. To these, the Government merely

replied that they had been furnished in reply to prior demands. The bill of particulars furnished (54-71), when read in conjunction with the indictment, fully advised appellant of all facts necessary for the preparation of his defense.

Paragraph III (55) of the bill informed appellant of the misrepresentations made, to whom made and when made. Paragraph VIII (56) of the bill supplements this information. Paragraphs XI, XII, XIII and XVII (57-58) of the bill give full information as to the mailing of the letters. Paragraph XXVI (59) supplements the information contained in the indictment and in paragraph III of the bill of particulars as to the false misrepresentations. Paragraph XXVIII (59-60) outlines Canning's connection with the companies. Paragraphs XIX to XXXII (60-61) itemize withdrawals of cash by each defendant. Paragraph XXXIII (61) gives definite information in connection with the write-up of the mortgage loans. Paragraph XXXV (62) itemizes the cash assets carried in the December, 1936 statement, which were received in 1937. Paragraph XXXVII (63) gives full information in regard to the falsity of the combined balance sheet of June 30, 1937. Paragraph XXXVIII (64-68) sets out in full the letter requested in the demand. Paragraph XLII (68) sets out in detail the falsity of the annual statement of the life insurance company for the year 1936. Paragraphs XLIV and XLV (69) give full particulars as to the falsity of the letter of March 2, 1937. Paragraphs XLVI to XLVIII (70) comply with appellant's demand as to the mailing of the letter of March 2, 1937.

On page 33 of Appellant's Brief, he contends that the answer to the demand in paragraph XLIX (70)

of the bill of particulars is not sufficient because the difference between the two statements referred to is not fairly and fully disclosed (70). The answer to this demand states that the difference between the financial statement referred to in paragraph 5 of the Sixth Count of the indictment and a financial statement referred to in paragraph 3 of the Sixth Count of the indictment is merely in the form of the statements or grouping of the items.

Appellant also complains because the Government was not compelled to furnish appellant with copies of financial statements and reports filed with the Corporation Commission of the State of Arizona or furnish appellant with copies of reports filed with Dunne's Insurance Reports. The trial court evidently felt, and properly so, that the office of the Corporation Commission of the State of Arizona was open to the defendants, and that they were in as good a position as the Government to secure copies of reports or statements filed with such Commission and copies of reports furnished Dunne's Insurance Reports. As a matter of fact, there was no direct evidence at the trial that appellant, or any of the defendants, directly furnished Dunne's Insurance Reports with any financial statements. The statement contained in Dunne's Insurance Reports evidently was based on statements filed with the Arizona Corporation Commission.

Appellant failed to point out a single instance during the trial of the case where he was prejudiced by the lack of any information or that he was placed at any disadvantage by failure of the Government to furnish further information.

Appellant was bookkeeper and auditor (743-744) for the corporations involved and, in addition, he was temporary receiver for the State Securities Corporation (278). All of the books and accounts which were introduced into evidence were brought into court on subpoena issued to the Receiver of State Securities Corporation, Mr. H. T. Cuthbert, and to the office of the Corporation Commission of the State of Arizona, which had possession of the books of account of the insurance company. All of these books and records were available to the appellant and were open to his inspection up to the time of trial.

III.

(Appellant's Brief, pp. 35-47)

EVIDENCE OF ACTS AND DECLARATIONS OF CO-CONSPIRATORS

Appellant opens his argument on this question with the statement that there was no evidence that the appellant entered into any conspiracy.

If this were true, then not only was the evidence of acts and declarations of the co-defendants improperly admitted but the appellant would have been entitled to a directed verdict of not guilty.

Appellant further states that there was no evidence that appellant had any knowledge of such acts or declarations, either before or subsequent thereto. It is not necessary that a conspirator have knowledge of the acts or declarations of his co-conspirators. He may know only his own part of the conspiracy.

Silkworth v. *United States,* supra.

The acts and declarations of co-conspirators in furtherance of a conspiracy are admissible against all co-conspirators.

Morris v. *United States,* 7 F. (2d) 785;

Silkworth v. *United States,* supra;

Osborne v. *United States,* 17 F. (2d) 246.

The answer to appellant's contention in regard to the admissibility of this evidence depends upon whether or not there was a conspiracy and whether or not appellant joined it. This necessitates looking at the record. Let us see what part appellant played in this conspiracy. He was a Certified Public Accountant, and kept the books of the State Securities Corporation during practically its entire existence (346). This is admitted by appellant (743). He kept the ledger of the Union Reserve Life Insurance Company and did most of the work in the insurance company's office (286). Government's Exhibit 7 included the annual reports of the Union Reserve Life Insurance Company for the years 1933 to 1936, inclusive. These reports were signed by appellant (303-304). The report for 1936 included a statement for that year prepared by appellant (753). These statements were false in many respects and known by appellant to be false. Still, he certified to them.

The item of $9,251.42, shown as cash on hand December 31, 1936, was false because it included cash collected in January and February, 1937 (267, 625,

756). Canning had knowledge of this fact (761-762). The same false entry occurs in Government's Exhibit 33 (481, 625), and in Government's Exhibit 36 (489, 627).

We wish to call attention to appellant's own testimony (762), in reference to Government's Exhibit 36 (489), which contained the balance sheet of June 30, 1937. Appellant admits that the entry showing cash on hand is false. He also admits that he did not know where the Home Owners' Loan bonds were which were carried as an asset in this statement and in Government's Exhibit 33. These bonds were, in fact, in the bank as collateral security for a loan (724).

Appellant admits that the general practice, before making a certificate to an audit as to assets, is to verify by checking of the actual assets themselves. This he did not do (763).

All of this testimony, together with much other testimony occurring in the record, clearly establishes the fact that appellant not only took part in the conspiracy but played a very important part. Being a Certified Public Accountant, financial statements and reports certified to or signed by him would, naturally, carry weight with the purchasing public, and would make more possible the success of the scheme or conspiracy.

There are many other items in the evidence which we have not discussed; for instance, the item of \$105,000.00 "Insurance Inventory", found in combined balance sheet of June 30, 1937 (Government's Exhibit 36). This was purely a fictitious item, put in for the

purpose of padding the assets, and neither Canning, nor any of the other witnesses, has satisfactorily explained what it means.

We have not discussed the fictitious write-up of the mortgage items. Appellant admits making the entries (764). These entries were made after the close of the year 1936.

The trial court and the jury determined from all the evidence that there was a conspiracy as charged and all of the defendants were found guilty. We think the evidence referred to above justifies the verdict of the jury and connects the appellant with the conspiracy.

IV.

(Appellant's Brief, pp. 47-54)

ADMISSIBILITY OF BOOKS AND RECORDS UNDER THE PROVISIONS OF SECTION 695, TITLE 28, UNITED STATES CODE ANNOTATED

Appellant further contends that the books and records were not properly admitted in evidence because the requirements of Section 695, Title 28, United States Code Annotated, were not complied with.

The quotation from 16 Corpus Juris 749, on page 49 of Appellant's Brief, is not a correct statement of the rule for the admissibility of books and records under Section 695, Title 28.

The records of the Arizona Corporation Commission were identified by Witness Ethel, Secretary of

the Corporation Commission (245). He testified that they were records of the Arizona Corporation Commission (246-252). The only objection made to the introduction of these exhibits was that they were incompetent and immaterial (246-247). Government's Exhibit 5 (249) was the only exhibit objected to on the ground of improper foundation (250). The witness had identified the exhibits as the records of the Arizona Corporation Commission in reference to the State Securities Corporation (249). This was sufficient to identify them as public records. The records themselves show their materiality.

This Court has held, where documents are not sufficiently identified but are similar to others which have been identified, they are admissible.

Mitchell v. *United States,* 23 F. (2d) 260.

On page 53 of Appellant's Brief are listed a number of exhibits which it is contended were not properly admitted. We have heretofore discussed Exhibits 1 to 6, being the records of the Arizona Corporation Commission. As to many of the other exhibits, appellant fails to cite all of the places in the record where testimony is found identifying such exhibits. For example, with reference to Exhibit 12, appellant fails to call attention to the testimony of Mr. Wilson (264), where he states "these entries were made in the regular course of business", and he also testified to the general method which, in itself, shows that the entries were made in the regular course of business (264-265).

As to the other exhibits listed in Appellant's Brief, on pages 53 and 54, in addition to the pages in the

record cited by appellant, we wish to call the Court's attention to other parts of the record affecting such exhibits:

Government's Exhibit 8 (295)

Government's Exhibit 10 (263, 298)

Government's Exhibit 7 (300, 303, 305, 698)

Government's Exhibit 17 (278, 309)

Government's Exhibit 24 (314)

Government's Exhibit 21 (351)

Government's Exhibit 23 (352)

Government's Exhibits 57 and 58 (512)

Government's Exhibit 11 (263, 298)

Government's Exhibit 14 (268)

Government's Exhibit 15 (269)

In addition to the foregoing, we have heretofore shown that Exhibit 7 was prepared in part by appellant and that the entire exhibit was certified to by him.

Government's Exhibit 18 is shown to have been made by appellant and the defendant Raymond F. Marquis (349).

V.

(Appellant's Brief, pp. 54-58)

REFUSAL OF THE COURT TO KEEP GOVERNMENT'S WITNESS KING WILSON IN ATTENDANCE UPON THE COURT

The witness King Wilson identified certain books and records that were kept by him, or in which he had made some entries. The purpose of his testimony was to lay the foundation for their introduction in evidence. As to many of these records, it was necessary to have the testimony of other witnesses before the exhibits were admissible.

Appellant complains because Wilson was not kept in attendance at Court for cross-examination until all of the exhibits were introduced in evidence. Any questions which it would have been proper to have asked the witness Wilson at any time during the trial could have been asked him at the close of his direct examination. There is no merit in appellant's contention that he should have been kept at attendance during a long and protacted trial. He cites no authorities sustaining his claim. There was no abuse of discretion on the part of the Court, and appellant has failed to show where he was prejudiced in any manner whatsoever.

VI.

(Appellant's Brief, pp. 59-60)

DID THE COURT ERR IN RECEIVING OVER APPELLANT'S OBJECTIONS TESTIMONY OF THE GOVERNMENT'S WITNESS E. P. HAIR ON REBUTTAL CONCERNING TRANSACTIONS BETWEEN THE UNION RESERVE LIFE INSURANCE COMPANY AND MARQUIS, CORNES & MARQUIS AND J. ELMER JOHNSON?

It is immaterial whether this testimony was proper rebuttal or whether it should have been introduced

in the case in chief. Its admission in rebuttal was within the sound judicial discretion of the Court.

Golsby v. *United States,* 160 U. S. 70; 16 Sup. Ct. 216.

The witness Hair was permitted to testify in regard to what Government's Exhibit 18 disclosed. Government's Exhibit 18 was admitted in evidence in the case in chief (350). The witness also testified from Government's Exhibit 23, admitted in evidence in the case in chief (353). These exhibits disclosed that J. Elmer Johnson had received money from the corporations involved in this case. Johnson was in the employ of the Arizona Corporation Commission up to the early part of 1935 (896). At least part of the transactions with the Corporation Commission regarding the sale of securities was had with Johnson (897). He had made an examination of the company and made a report to the Commision (728-729). The purpose of the testimony of Mr. Hair was to explain to the jury the entries in the books in evidence disclosing transactions between Johnson and the companies involved, in order that the jury might determine whether or not the officers of the company, in using Mr. Johnson's report and relying thereon, were doing so in good faith, in view of the fact that during part of the time, at least, he was receiving payments in cash from the company.

VII.

(Appellant's Brief, pp. 61-66)

DID THE COURT ERR IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE GOVERNMENT'S CASE AND AT THE CLOSE OF THE WHOLE CASE?

The motion made at the close of the Government's case was waived by the introduction of evidence in behalf of appellant.

In discussing appellant's argument under Question III (Appellant's Brief, p. 35), we called attention to some of the evidence connecting appellant with the conspiracy. We believe that our argument under that topic is sufficient answer to appellant's contention that he was entitled to a directed verdict. However, to summarize briefly; appellant kept the books of the State Securities Corporation and made entries in and audited the books of the Union Reserve Life Insurance Company. He prepared financial statements and reports as to both companies. These reports and statements were false in many particulars and were known by appellant to be false. He testified that he knew that the purpose of his audits was to have people rely upon his certificate as a Certified Public Accountant (763). He admitted that he did not verify the assets, such as the Home Owners' Loan bonds (763), which were, in fact, up for collateral security. He also admitted the false entry in regard to the cash on hand December 31, 1936 (762).

These acts alone were sufficient to prove his guilt. When we read the entire record and view it as a whole, the evidence of his guilt is conclusive.

VIII.

(Appellant's Brief, pp. 66-73)

DID THE COURT ERR IN INSTRUCTING THE JURY AND IN REFUSING APPELLANT'S REQUESTED INSTRUCTION?

Assignment of Error LXXIV (213):

In reading the instruction complained of, we must read it in connection with the instruction just preceding it (923-924). There the Court defines the responsibility for representations with the qualifications mentioned in Appellant's Brief on page 68. All that the instruction complained of does is to say that one who adopts and uses the statements of others is equally responsible therefor. It necessarily follows that the same qualification applies to adopted statements as to those originally made.

Assignment of Error LXXV (214):

The instruction here complained of (908-911) when read as a whole, is favorable to appellant. It reiterates the doctrine of reasonable doubt, and the portion quoted in Appellant's Brief on page 69 carefully points out that jurors cannot find guilt by preponderance of evidence but that it must be shown to a moral certainty.

Assignment of Error LXXVI (217):

This instruction (912-913) is a stock instruction in mail fraud cases. There is no inference, as appellant says, that fraud exists regardless of the evidence.

Assignment of Error LXVII (218):

The instruction complained of in this assignment (916) follows this statement:

> " * * * the Government must, however, show by proof convincing you beyond a reasonable doubt that as to one or more of the separate lines of

> activities in which one or more of the defendants participated, there did come into activity a scheme or schemes to obtain money or property by means of false pretenses, etc,"

and just prior to that the Court carefully defined the things necessary to constitute the offense charged in the first five counts of the indictment (914-915). Appellant was acquitted on each of these counts.

Assignment of Error LXXVIII (218-219):

This instruction (923) states the fundamental principle of law in mail fraud cases and has none of the faults charged in Appellant's Brief.

Assignment of Error LXXIX (219):

Appellant has misread and misinterpreted the instruction here complained of (925). It clearly states that an employee must have knowledge of the unlawful scheme to defraud. In addition, on this same point, the Court gave this further instruction (928-929):

> "You have been instructed that any person who takes part in the carrying out of a scheme to defraud, such as bookkeepers, stenographers, or salesmen can be convicted as a principal. This does not mean that every employee of the company wherein some of the officers had devised a scheme to defraud, can be convicted for carrying out such a scheme under the supervision of the officers who might have devised such a scheme, nor that all the officers of the corporation or corporations not engaged in such scheme, can be convicted therefor,

but in order to convict such employee or officers, it is incumbent upon you to find that they had joined in effecting of such scheme, or that they had become acquainted with the scheme or device before the letters charged in the various counts of the indictment were mailed, and thereafter performed some act calculated to further carry out the scheme to defraud alleged in the indictment with the intent and knowledge that such act would be so effective."

Assignment of Error LXXX (220):

The appellant objects to that part of the instruction which reads as follows (939-940):

"Where a witness has a direct personal interest in the result of a case, especially in a criminal case, the temptation may be strong to color, pervert or withhold the facts."

This statement is based upon years of experience in criminal cases. It did not take away from the jury their right to determine in this particular case whether or not the appellant was speaking the truth. This instruction has been given in many criminal cases in Federal Courts and we have been unable to find any case in which it has been criticized.

Assignments of Error LXXXI to XCVII (221 to 234):

These asignments cover instructions requested by appellant. All of the instructions requested by appellant which correctly stated the law of the case were

given by the Court, or were included in other instructions. A reading of the Court's instructions as a whole will disclose that they were eminently fair and favorable to appellant.

IX.

(Appellant's Brief, p. 73)

DID THE COURT ERR IN REFUSING TO STRIKE FROM THE TESTIMONY THE EXHIBITS ADMITTED IN EVIDENCE ON BEHALF OF THE GOVERNMENT?

This question is answered in our argument in this brief replying to appellant's contention that the Court erred in admitting such exhibits in evidence. There is no necessity for repeating that argument.

CONCLUSION

It is respectfully submitted that the evidence clearly establishes the guilt of appellant; that he had a fair and impartial trial; that no prejudicial error was committed, and that the judgment should be affirmed.

Respectfully submitted,

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K. BERRY PETERSON,
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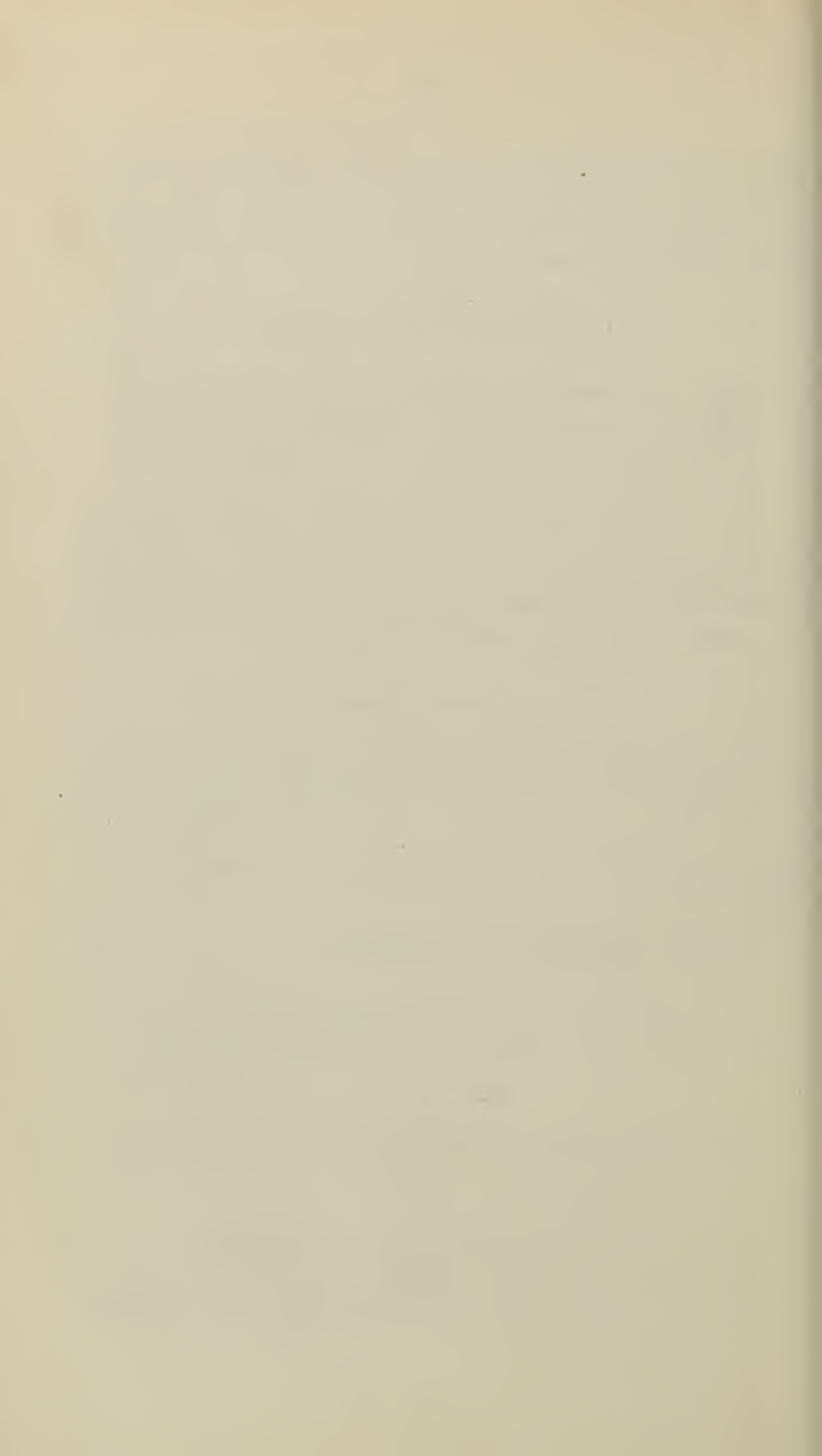
Attorneys for Appellee.



No. 9531

IN THE

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EARL CANNING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Arizona

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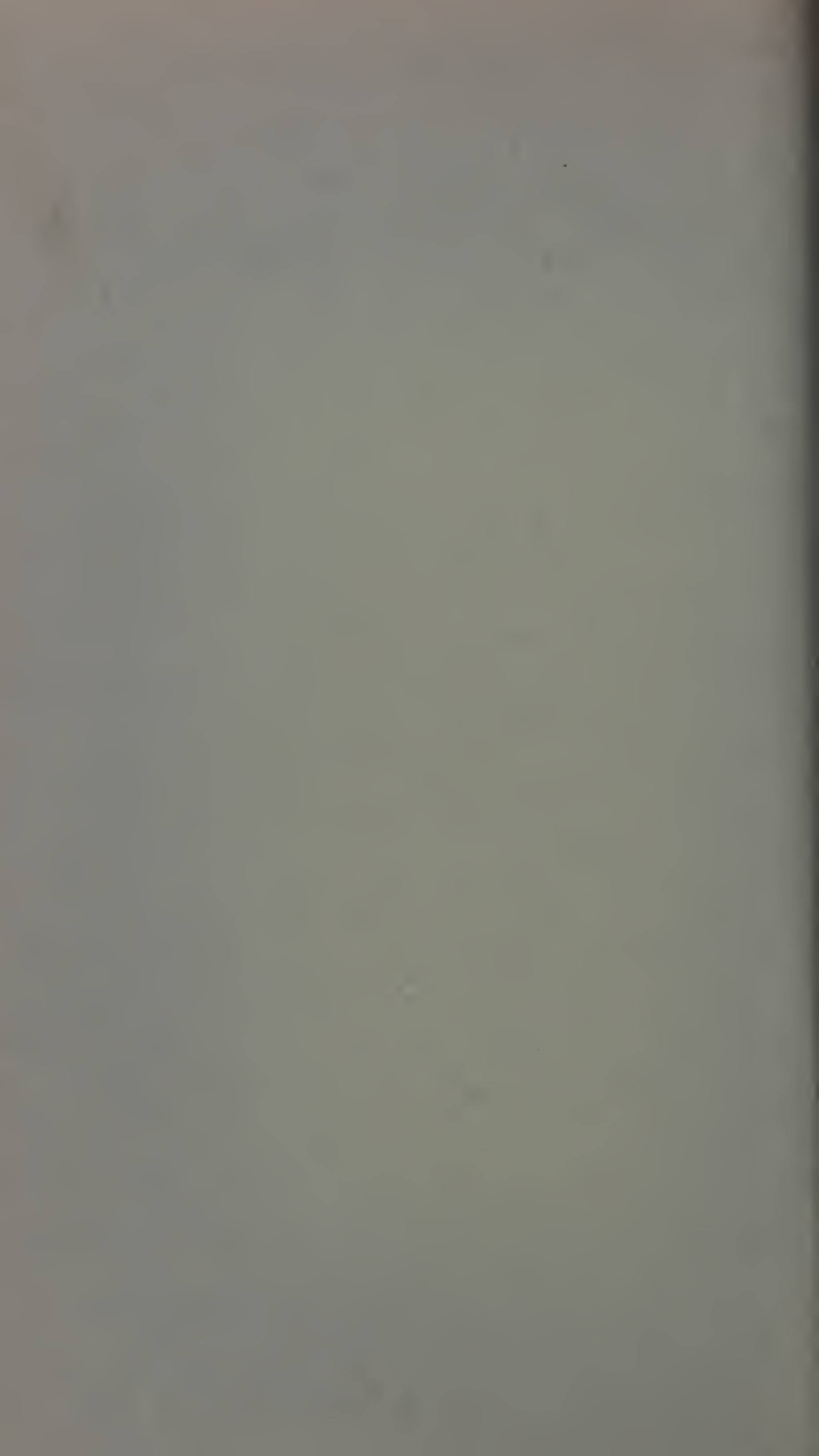

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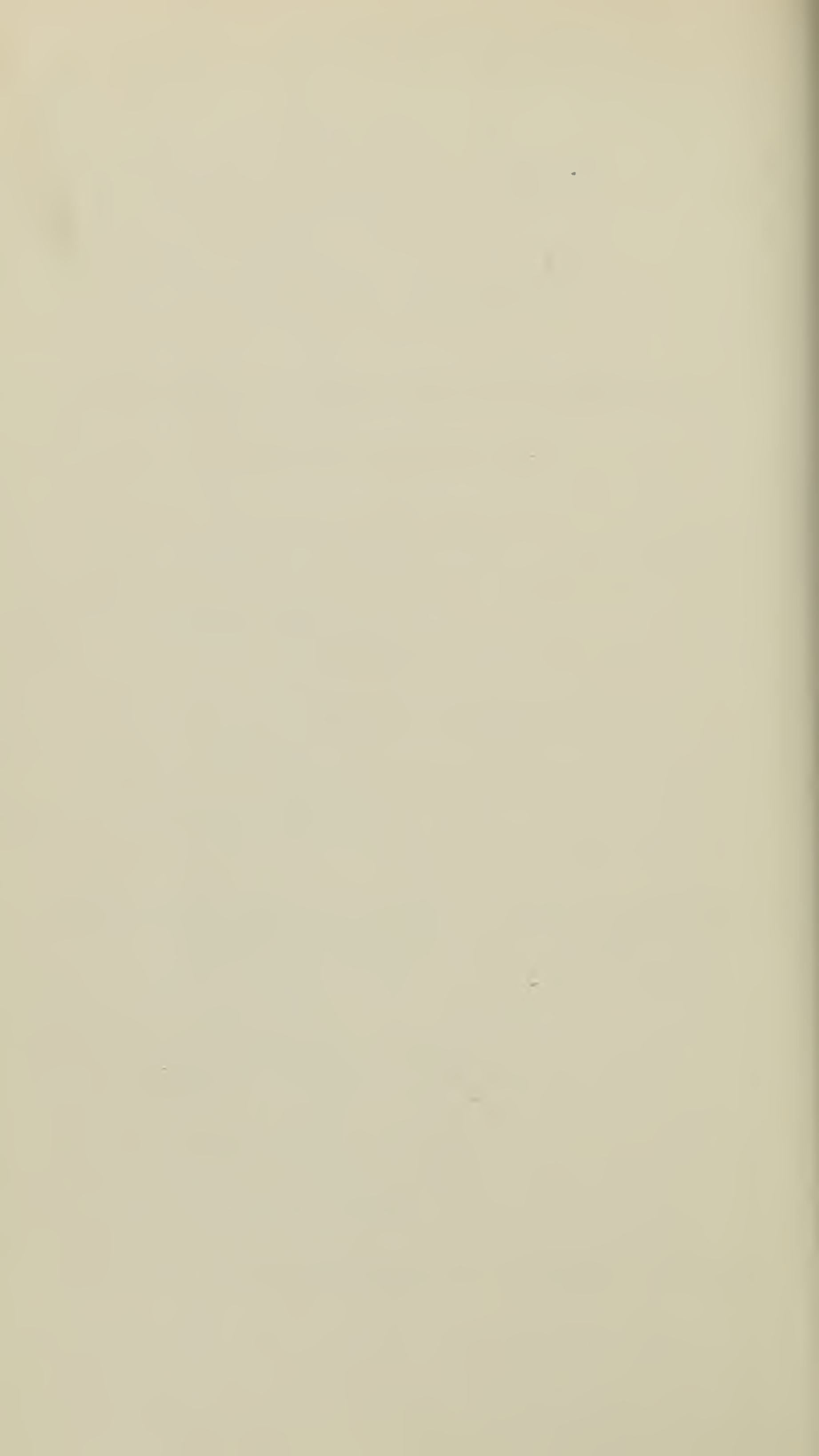

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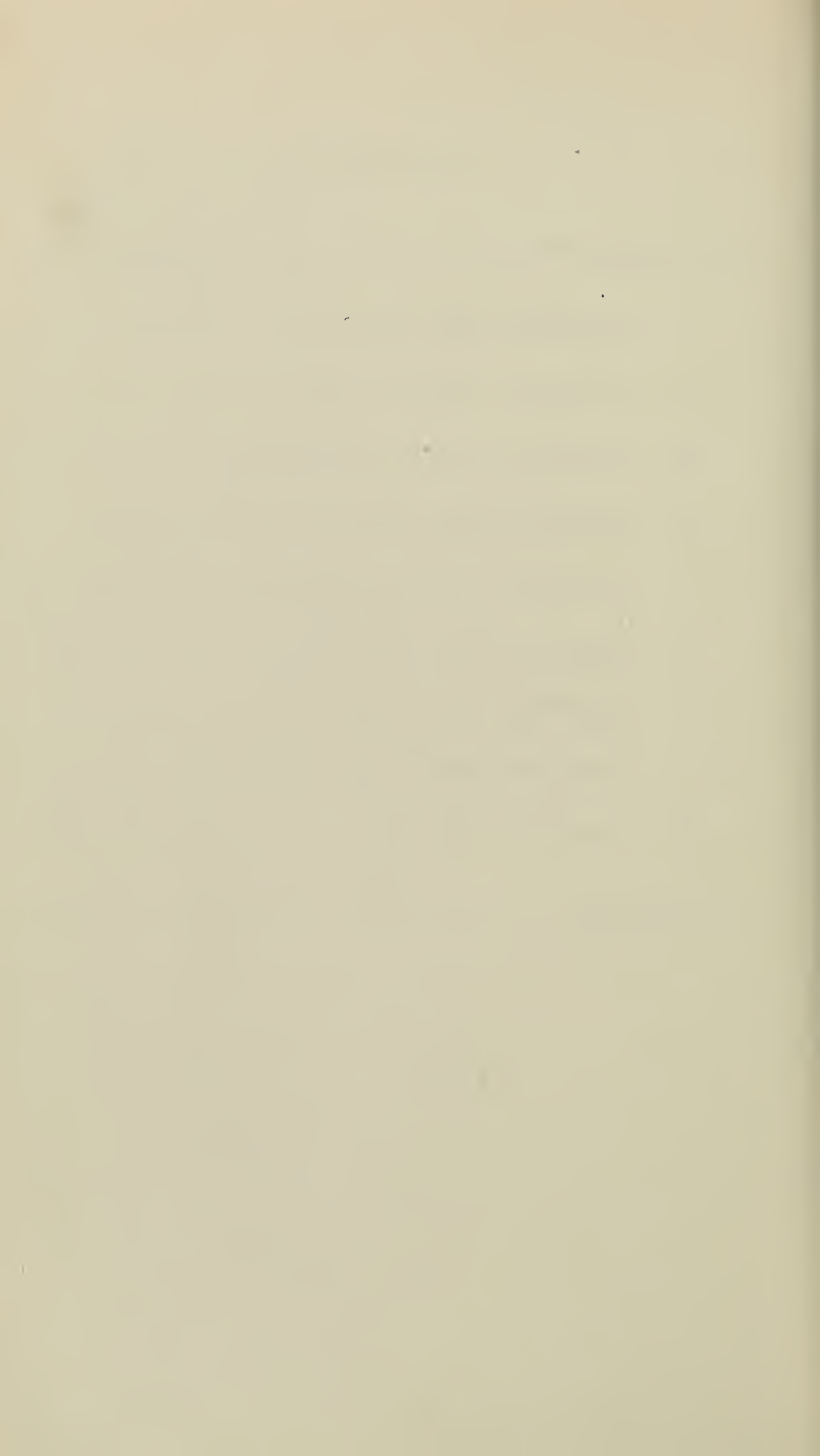

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REPLY BRIEF OF APPELLANT

In presenting this reply brief in answer to the brief of appellee counsel have no desire to again discuss or argue the questions presented in appellant's brief, but it is felt that in justice to appellant and to the Court some of the things mentioned in the argument in appellee's brief should be answered. In presenting the argument we will discuss the questions in the order presented in appellee's brief.

ARGUMENT

I.

(Appellee's Brief, 2, 3.)

Appellee states in the discussion of this phase of the argument in appellant's brief, that the indictment was sufficient and should be held sufficient on the authority of certain cases decided by the Federal District Court, which cases are cited by appellee in its brief.

Appellant, in reply to these statements, only desires to call the Court's attention to the cases cited by appellee, and respectfully asks the Court to read each of these cases. In doing so the Court will find that in every instance the indictment, while charging that the defendants agreed that they would do certain things, went farther and alleged that the defendants did do the things which the indictment charges they agreed they would do. In that respect the indictments approved in the cases cited by appellee differ radically from the indictment in the case at bar. The complaint made by appellant is that, under the bare allegation that defendants agreed they would do certain things, proof was permitted without any charge in the indictment that defendants did do the things charged in the indictment they argeed they would do. It is the contention of the appellant that, as set forth in his brief, the indictment was fatally defective, and it is respectfully submitted that the cases cited by appellee furnish sufficient authority for appellant's position in this respect.

II.

(Appellee's Brief, 4, 5, 6, 7.)

In reply to appellee's discussion of this question pre-

sented by appellee's brief, counsel wishes to state that they have no quarrel with counsel for appellee as to the law relative to the Court granting a Bill of Particulars. It is conceded that it is within the sound discretion of the trial court, but appellant contends that the trial court abused that sound judicial discretion in not requiring the Government to furnish an additional Bill of Particulars upon the request of this appellant. Appellee tries to answer the objection of appellant by taking the position that it was, as charged, appellant's duty to examine the records of the Corporation Commission for copies of the reports and statements filed with the Commission, including copies of the reports furnished Dunnes' Insurance Reports, and then reveals the whole situation to which appellant objected and about which appellant asked further information when appellee states:

> "As a matter of fact, there was no direct evidence at the trial that appellant, or any of the defendants, directly furnished Dunne's Insurance Reports with any financial statements. The statement contained in Dunne's Insurance Reports evidently was based on statements filed with the Arizona Corporation Commission."

If that is true, and it must be conceded to be true, then there was no way for this appellant to ascertain from the Corporation Commission anything relative to what was contained in Dunne's Insurance Reports, and appellant had no information whatever as to how to proceed in defending against the particular charge.

Appellee argues that appellant was bookkeeper and auditor for the corporations involved and, in addition, he

was temporary receiver for the State Securities Corporation; that all of the books of account which were introduced in evidence were brought into court on subpoena issued to the receiver of said State Securities Corporation, Mr. H. T. Cuthbert, and the office of the Corporation Commission of the State of Arizona. It must be remembered, however, that appellant was succeeded as such receiver by Mr. H. T. Cuthbert on March 28, 1938, nearly a year and a half before the indictment in this case was returned. (RT 277) At the time appellant had the books and records in his possession as such receiver he had no knowledge or information that an indictment would be returned against him in connection with any of the transactions which he had with either of the corporations.

While counsel for appellant are well aware that they are not entitled to have the Government go into minute details of evidence in presenting a bill of particulars, yet appellant is entitled to know in general the things which he must defend against and have such information relative thereto as is necessary for him to prepare and present his defense. The failure of the trial court to order an additional Bill of Particulars in the instant case, appellant contends, was an abuse of judicial discretion.

III.

(Appellee's Brief, 7, 8, 9, 10.)

Counsel for appellee apparently confuses the rule of law as to proof of the entering into the conspiracy with the proof of overt acts necessary to make such conspiracy a criminal offense.

Counsel for appellant contend that there is no evidence in the record which by any construction can be said to prove or tend to prove that appellant entered into any conspiracy with any person. Until that fact is proven the acts and declarations of alleged co-conspirators in furtherance of the conspiracy are not admissible against appellant.

Again the cases cited by appellee under this argument are exactly what appellant contends. However, appellee goes farther in its effort to bolster up its case against the appellant and cites to the Court testimony which the appellee contends prove the existence of the conspiracy. Let us look at that testimony and see how nearly appellee's statement of the testimony is correct.

Appellee calls the Court's attention to the testimony (TR 346) where Gertrude Conway states that she was employed by the companies until the first of January, 1937, and that appellant kept the books for the State Securities Corporation during all the time she was there. Now let us look at the testimony of the appellant, which was never contradicted or denied (TR 743, 744) where we find this testimony:

> "I did not open up the books for the State Securities, I kept the books but I did not open them up. During the time the records of the State Securities Corporation were kept. I was in charge of keeping books and records, the ones introduced in evidence here." (743)

> "The general ledger and cash book were discontinued in 1933 for the State Securities Corporation.

After that we took the checks as issued and the deposits as put in the bank and the money as received and noted them down on work papers and determined the condition of the company that way." (744)

Appellee says that appellant kept the ledger of the Union Reserve Life Insurance Company and did most of the work in the insurance company's office. (TR 286)

The testimony of Ora T. Hill is that she went to work for the life insurance company in 1929 and stayed with the company until March, 1938; that she kept the books until about December, 1933; that King Wilson kept the books after that until he left, and after he left she helped with it. (TR 286). King Wilson's testimony (TR 262) is that he stayed with the company until June 15, 1937 and that he made all entries in the books until June 15, when he left; that during the time he was there he does not know of anyone else making any entries in the books except that Mr. Canning, as accountant for the company, made the closing entries. Again Ora T. Hill says (TR 286) that after King Wilson left she kept the cash book and that Mr. Canning kept the ledger of the Union Reserve Life Insurance Company, which, under the testimony, was the period from June 15, 1937 to about January 1, 1938.

We respectfully submit that the construction placed upon all of this testimony by appellee is not justified by the testimony and that the court should have sustained the objection of the appellant to the introduction of acts and declarations of alleged co-conspirators, be-

cause no proof of any conspiracy had been made by the Government in so far as appellant was concerned.

IV.

(Appellee's Brief, 10, 11, 12.)

It is, of course, appellant's contention that the rule as laid down by Corpus Juris, and quoted in appellant's brief (49) is the proper rule for the establishment of the competency of books and records and that, in so far as Section 695, Title 28, USCA, changed the rule, that section is unconstitutional.

Counsel for appellant has evidently overlooked the objections made to the introduction of the exhibits, because counsel says in its brief (11):

> "The only objection made to the introduction of these exhibits was that they were incompetent and immaterial."

It will be found that throughout all of the objections that the objection was made that the exhibits were hearsay; that certain of them were not within the issues as defined by either the indictment or bill of particulars; that if admitted the exhibits should be limited to certain defendants (TR 246, 247); that certain portions of exhibits had not been properly identified (TR 250); that Exhibit 12 (TR 265) was inadmissible against this defendant because there was no showing that he had anything to do with the bookkeeping system of the company; that as to Canning it was pure hearsay; that it had not been shown that the entries were original entries, or the first permanent entries of the transaction;

that there was no attempt to produce persons who made the original entries or persons having knowledge of the facts; that said entries were not corroborated by any person having personal knowledge of the facts; that there was no showing that such persons were dead, insane or beyond reach of process. A further exception was made to the exhibit on the ground that it was introduced under Section 695, Title 28, USCA, and that said act was unconstitutional because it shifted the burden of proof from the Government to the defendant; that said act was unconstitutional and void in that it violates the Sixth Amendment to the Constitution of the United States and deprives the defendant of the right to be confronted with the witness against him, and that no opportunity had been afforded to cross examine the persons who are familiar with the accounts and transactions or who made the original entries; that said document was pure hearsay as to appellant; that there was no showing that the document had been made in the regular course of business of the company; that said document is not the best evidence; is hearsay, and is irrelevant, incompetent and immaterial.

Certainly then counsel for appellee is mistaken when the statement is made that the only objection made to the exhibits was that they were incompetent and immaterial.

V.

(Appellee's Brief, 12, 13)

It is not easy to understand how appellee can make the statement in his answer to the fifth contention of appellant's argument, that appellant cited no authorities

sustaining his claim that the court erred in refusing to keep the Government's witness, King Wilson, in attendance upon the court. In this connection the Court's attention is respectfully called to appellant's brief, pages 54, 55, 56, 57, 58. It certainly seems that appellee is begging the question when counsel for appellee knows that an attempt was made on cross-examination to question the witness relative to information in some of the books which had not yet been introduced and offered in evidence, and counsel for appellee objected because the books had not been introduced in evidence. With this full knowledge, counsel for appellee states:

> "Any questions which it would have been proper to have asked the witness Wilson at any time during the trial could have been asked him at the close of his direct examination."

The two positions taken by counsel for appellee are so inconsistent that query might well be made, if counsel for appellee makes his own law as he proceeds to meet the exigencies of his acts?

It is the contention of appellant that in so far as cross-examination of witnesses by a defendant is concerned in criminal cases, the court has no discretion to refuse or not refuse permission to cross-examine, because the right to be confronted with a witness and cross-examine him is an absolute right, and the authorities for this statement are set forth in appellant's brief.

VI.

(Appellee's Brief, 13, 14)

Appellee attempts to justify the action of the court in receiving as rebuttal the testimony of E. P. Hair concerning transactions between the corporations and J. Elmer Johnson, and proceeds on the theory that the testimony would have been admissible in the case in chief and, hence, was admissible as rebuttal testimony, even though it had no tendency to rebut any testimony which had been presented by the defendants. J. Elmer Johnson had not been a witness, no grounds for impeachment had been laid as to any witness, and clearly would not have been admissible in the case in chief. An objection was made to the introduction of this testimony on all of these grounds (TR 881-895).

The plain purpose of the offer of this testimony by the Government was to prejudice the jury against the defendants, and the Court should have sustained the objection.

VII.

(Appellee's Brief 14, 15)

In reply to this argument on behalf of appellee, appellant directs the Court's attention to the whole case and submits that with all of the evidence there is no competent evidence to sustain a verdict against this appellant.

Appellee apparently seeks to convey to the mind of the Court that the only motion for a directed verdict was the motion made on behalf of appellant at the close

of the Government's case, and appellee states in its argument that this motion was waived by the introduction of evidence in behalf of appellant. The record shows, however, that after the entire evidence in the case was received and both appellee and appellant had rested, counsel for appellant again moved the court for a directed verdict and urged all of the grounds set up in the first motion for a directed verdict at the close of the Government's case and additional grounds set out in the motion (RT 899-903).

It, of course, is possible in any case to select isolated questions and answers without any further explanation, and on these isolated questions and answers, without regard to anything else, say that a defendant was properly convicted. We respectfully submit, however, that an examination of the entire record will show that the motion for a directed verdict should have been granted.

VIII.

(Appellee's Brief, 15, 16, 17, 18, 19).

In answering this portion of appellant's argument appellee tries to dismiss the error complained of by ignoring the questions presented by appellant. Appellant does not desire to enter into a lengthy discussion in this reply brief as to the assignments of error covering the instructions given by the court. Appellant only desires to call the Court's attention to the instructions and request that the Court examine said instructions in the light of the objections made thereto (TR 903-962).

IX.

(Appellee's Brief, 19)

In reply to this answer of appellee to appellant's brief, it is not deemed necessary to discuss again the reasons why the court should have stricken from the testimony the exhibits admitted in evidence on behalf of the Government. That question was fully covered in appellant's brief in discussing the error of the court in overruling the objections made by appellant to the introduction of said exhibits at the time they were received in evidence, for all of which reasons appellant contends the exhibits should have been stricken.

CONCLUSION

It is respectfully submitted that in view of the errors complained of, and the law relative thereto, and the brief of appellee, this Court should reverse the conviction of appellant and remand the case with directions to the United States District Attorney to dismiss the indictment and order the release of the appellant Earl Canning.

Respectfully submitted,

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Attorneys for Appellant Earl Canning